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CONGRESSIONAL OVERSIGHT OF
ADMINISTRATIVE AGENCIES
(The Cost of Living Council)

HEARINGS
BEFORE THE
SUBCOMMITTEE ON SEPARATION OF POWERS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
NINETY-THIRD CONGRESS
FIRST SESSION
ON
THE COST OF LIVING COUNCIL

OCTOBER 9 AND 10, 1973

VOLUME 1

Printed for the use of the Committee on the Judiciary



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CONGRESSIONAL OVERSIGHT OF ADMINISTRATIVE AGENCIES

(Cost of Living Council)

TUESDAY, OCTOBER 9, 1973

U.S. SENATE,
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:05 a.m., in room 6226, New Senate Office Building, Senator Charles McC. Mathias, Jr., presiding.

Present: Senator Mathias.

Also present: Walker F. Nolan, Jr., deputy chief counsel; J. I. Pecore, assistant counsel; Quincy Rodgers, minority counsel; and Telma P. Moore, executive assistant.

Senator MATHIAS. The subcommittee will come to order.

OPENING STATEMENT OF SENATOR MATHIAS

We are now in the third year of the fourth so-called phase of a national economic stabilization program, otherwise known as wage and price controls.

From the outset, this program has been characterized as a temporary program. The time has come, I believe, to question what is meant by the word "temporary" insofar as it applies to national wage and price controls. If, as it appears, the program is to be with us for a prolonged period of time, then it is vitally important that we examine the manner in which it is operating.

The program is administered by the Cost of Living Council, a small group of men who have been given enormous authority to make decisions affecting all elements of the Nation's economy. This authority, which the Congress has given to the President and through him to the Cost of Living Council, is largely unchecked.

The Council can make or break any business in America. Yet, it is subject to unclear and uncertain statutory standards and can wield its authority without hearings, without explanations, and with only a limited right of appeal. This is executive discretion in the extreme.

Such authority on a temporary basis under emergency circumstances is not without precedent. As cochairman of the Special Committee on the Termination of the National Emergency, I have been exploring the effect of granting similar power in other circumstances.

I can appreciate that under emergency circumstances and on a truly temporary basis, the Congress has been traditionally more willing to forgo limitations on executive authority.

But in the case of the wage-price program and its administration by the Cost of Living Council, it is essential that the Congress now examine the extent to which the Council is complying with current legal requirements, and determine whether legislation might be required to bring about changes in the administration of the program.

This inquiry is brought about by the growing concern expressed by both the public and the private sectors of the economy. Questions have been raised about the process for obtaining exceptions; about the availability of information on procedures; about the enforcement of the wage-price program; about the burden of the regulations themselves on businesses that try faithfully to comply with them.

With respect to the exception process, there are many other questions that we need to raise both today and in the future. For instance, the regulations relating to the exception process require applicants for exceptions to present evidence of "serious hardship" or "gross inequity." These terms are not defined in the regulation, and they are not explained in the list published by the CLC.

Crucial to the oversight activities of this subcommittee are questions relating to the standards which are applied by it and by the Internal Revenue Service in the course of its decisionmaking process. I am pleased that, following discussions between officials of the Cost of Living Council and members of the subcommittee staff, the Cost of Living Council has agreed to the publication of its phase IV handbook—revised, frequently known as the IRS Manual.¹ This manual contains information regarding the operations of the Cost of Living Council which has not previously been made public. Included in that information are considerations that are to be weighed in the course of making decisions. For instance, in the case of exceptions, the manual points out that the analyst studying the problem should consider whether denial of the exception request will cause hardship to fall on the community, labor force, or a third party. What the manual fails satisfactorily to do, however, is to advise such analyst of the standards which are to be applied in making judgments, the norms against which given sets of facts are to be weighed. The manual also fails to provide this needed information to the public.

To the extent that the Cost of Living Council has additional detailed standards, these should also be made public. I hope that they will be during the course of these hearings. This includes quantitative standards for measuring applications. To the extent that such standards do not exist, I believe that an attempt should be made to establish them through the notice and comment process and, because all situations cannot be anticipated, through an informative body of precedent which is easily obtainable by all concerned with the operations of the program.

It is not the purpose of these hearings to look into questions of economic policy. Such questions are under constant congressional review and will continue to be considered by the relevant Senate committees when the authorization for the current program expires and the Congress, once again, considers whether to grant an extension.

¹ The manual, referred to on pp. 2, 98, and 150, in use as of the date of these hearings, has been published as an appendix to these hearings, entitled "Congressional Oversight of Administrative Agencies (The Cost of Living Council)," appendix to hearing before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, vol. 2. Copies of the Appendix (vol. 2 of these hearings) containing the manual are available through the subcommittee office.

Rather, the subcommittee will look into questions of the administrative procedure employed by the Cost of Living Council, personnel now being used to administer the program, sanctions provided for in the act and otherwise in use, the mechanism for enforcement and its use, and the availability of judicial review. In so doing, we are particularly concerned with the impact of the wage-price program on the regulated. Thus, the ability of individuals and corporations to both know the nature and extent of their obligations under the law and to effectively state their case is of paramount importance to the subcommittee. This much seems clear—no program will long retain, or deserve, popular support if its decisions are not arrived at by a process which appears open, fair, consistent, thorough, rational, enforceable, and, of course, necessary.

In undertaking this investigation, I am cognizant of the awesome problem that such a program presents to those charged with administering it. Whether or not an effective wage-price program can be administered at the levels of personnel now available is a major question. It may also be that we will conclude the Council would suffer a breakdown under procedures that required full recordkeeping and other procedural rights. If this is the case, it is an issue which, I believe, should be squarely faced.

These hearings are in keeping with a tradition of the Subcommittee on Separation of Powers which has conducted hearings to consider the role of the independent administrative and regulatory agencies. Senator Ervin has articulately stated the subcommittee's purpose (hearing record before the Subcommittee on Separation of Powers, Congressional Oversight of Administrative Agencies, NLRB, Mar. 26, 1968, vol. 1, p. 1) :

The independent administrative agencies now constitute a fourth branch of the Federal Government—some have described them as the "headless" fourth branch. In a relatively short time, they have come to have responsibility over major areas of public interest—transportation, public relations, communications, trade regulations, and finance, to mention only a few. Further, the administrative agencies are an innovation in the tripartite system, conceived by the Founding Fathers. The fact that they exercise a combination of legislative, executive and judicial powers, and so represent a major deviation from the separation of powers formula, is another reason for including them in our study.

I am hopeful that these hearings can make a meaningful contribution to the debate which the Congress will enter when the authorization for the wage-price program again comes due. I am confident that by airing some of the prior difficulties with the program and by openly examining the current procedures, the subcommittee can make a meaningful contribution to the work of the program.

At this point in the record, I would like to have inserted a copy of section 207 of the Economic Stabilization Act.

[The material referred to follows:]

ECONOMIC STABILIZATION ACT OF 1970, AS AMENDED, SECTION 207

SEC. 207. Administrative procedure.—(a) The functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, except as to the requirement of section 552, 553, and 555(e) of title 5, United States Code.

(b) Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking an interpretation,

modification, or rescission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings where deemed advisable, for considering such requests for action under this section: *Provided*, That such agency shall issue no order which has the effect of reducing wages, or salaries in effect, or proposed to be put into effect, in an appropriate employee unit unless such order is made on the record after opportunity for a hearing. Not less than thirty days after issuance of such an order a statement of explanation shall be directed to the affected parties and made available to the public. Such statement shall include a full explanation of the reasons why the existing wage or salary, or proposed wage or salary adjustment, does not meet the requirements of or the standards established by the regulations prescribed by the agency.

(c) To the maximum extent possible, the President or his delegate shall conduct formal hearings for the purpose of hearing arguments or acquiring information bearing on a change or a proposed change in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers, which have or may have a significantly large impact upon the national economy, and such hearings shall be open to the public except that a private formal hearing may be conducted to receive information considered confidential under section 205 of this title.

Also, before we call our first witness, I would like to enter into the record some material which carries forward at least a part of the purpose of the hearing which is to establish a detailed ledger of useful information for those persons who are interested in following the operations of the Cost of Living Council. And in pursuance of that purpose, I now place in the record the following documents:

1. A chronology prepared by the subcommittee staff which shows the major events in the operation of the wage-price program, including references to the acts of Congress, Presidential orders, and the major Cost of Living regulations.¹

2. A copy of the Economic Stabilization Act as amended, and pertinent Executive orders.²

3. Regulations issued under phase IV governing procedures.³

4. A series of organizational charts of the Cost of Living Council supplied by the Council for these hearings.⁴

5. A copy of the Council's order No. 37, subsequent orders delegating authority and the agreement between the Cost of Living Council and the Internal Revenue Service on the operation of these two agencies in implementing the Economic Stabilization Act.⁵

6. A copy of Judge Leventhal's decision in the *Amalgamated Meat Cutters* case. This decision was rendered prior to the December 1971 amendments to the act which established the current procedural guidelines.⁶

We will call as our first witness, Charles L. Binsted, who is executive director of the Greater Washington-Maryland Service Station Association and president of the National Congress of Petroleum Retailers.

Mr. Binsted, we are very happy to have you here and appreciate your taking the time at a somewhat tumultuous moment in the history of your industry to testify.

¹ See p. 219.

² See p. 219.

³ See p. 248.

⁴ See p. 266.

⁵ See p. 277.

⁶ See p. 287.

**STATEMENT OF CHARLES L. BINSTED, EXECUTIVE DIRECTOR,
GREATER WASHINGTON-MARYLAND SERVICE STATION ASSO-
CIATION, AND PRESIDENT, NATIONAL CONGRESS OF PETROLEUM
RETAILERS, INC.**

Mr. BINSTED. We are very happy to be here and to bring to your attention the problems of the service station dealers under phase IV regulations.

I do not have a prepared statement, but I do have some notes here and I would like to explain to you, if I might, what we found to be the difficulties as far as service station dealers are concerned in attempting to comply with phase IV regulations.

First of all, it was our position that being small industry retailers with relatively few employees, that we should have enjoyed the 60-employees-or-less exemption granted to all other businesses with the exception of the service station dealers.

However, that was not granted, although I believe that we proved that under phases II and III, competition would work in the retail market and that it was not necessary to place these controls on the very small dealers.

However, these controls were placed, and our initial problem was the fact that the Cost of Living Council required us to roll back our gross profit margins to January 10 of this year, a very depressed period.

The Council did say that we would have a 7-cent minimum margin for those who were engaged in price wars and who happened to be below that level. However, we had an immediate round of wholesale price increases which eroded that margin to 6, or 5.5 cents during the first week of the regulations.

We were also being discriminated against since the refiner-retailer was allowed the May 15 date for the establishment of his ceiling price. By refiner-retailer I mean the company that is totally integrated as far as that one particular area of the business is concerned, from refining all the way through operation of the service station itself, and he was allowed the May 15 date.

Now, the companies were allowed and are allowed to increase the wholesale price without renotification, as I understand it, to the Cost of Living Council, and this they have done, anywhere from two-tenths of a cent a gallon to a cent and a half a gallon at any one time.

The dealer cannot pass that through to the public without permission from the Cost of Living Council, which will come only after review and there has been no set schedule for this review.

These increased wholesale prices can cost the dealers up to \$3 million a day, and that is a considerable amount of money to be absorbed by probably a couple of hundred thousand retail gasoline dealers.

As an example, a dealer, an average dealer in Montgomery County, perhaps, will pump 50,000 gallons of gasoline a month. A cent increase in the wholesale price to him which he is not allowed to pass on costs him \$500 a month out of his pocket, and BP oil just increased the price yesterday to 1.3 cents a gallon, so that dealer would be losing perhaps \$750 a month based on that assumption, and with no indication of when he will get relief.

Now, we had several meetings with the Cost of Living Council. At the first meeting we had 300 dealers from all over the Nation in

town, and we had to rotate into the auditorium of the Cost of Living Council trying to bring our case to their attention, and we had several meetings with staff after that, and we gave them all the reasons why we could not afford these wholesale prices and why we shouldn't be rolled back.

However, the regulations as proposed were the regulations as written, and we did immediately go to court and attack them, and we did win a Federal court order saying that the regulations were arbitrary, capricious, and denied us due process.

However, the court of appeals now has that order and there is a stay order on that and we have no indication at all as to when we will have results, either negative or affirmative, from the Cost of Living Council.

Now, in discussing why we must be the scapegoats, we must absorb the wholesale price, if in fact the Cost of Living Council cannot control it at its source, we were told by the Cost of Living Council staff people that we would exert back pressure on the companies, that if they did not allow us to increase the price to the public, then the companies certainly would not increase the price to us.

Now, first of all, we are captive dealers. If I am an Exxon dealer and Exxon raises the price to me 1 cent, I cannot buy Gulf gasoline because it is cheaper. I am stuck with Exxon. And this is one reason why I don't believe this theory will work.

Now, in addition to that, there is no question about the fact that the theory has not worked. We had price increases on September 8. We had Exxon, 1 cent; Sohio, 1 cent; Mobil, 1 cent; Union, 1 cent; American Petro Fina, 1 cent; and on it goes in the first round of the price increases before we did get relief on September 28; and immediately upon getting relief on September 28, on September 29, the date of the increase in the price of 2 cents. Phillips, 1.5 cents; American, eight-tenths of a cent; Arco, 1.5 cents; Ashland, 2 cents; BP, 1.3 cents; and this is just to mention a few. And the dealers are expected to absorb that so that will not be passed on to the public.

Now, we understand the problem of raising prices and we don't want to see the public have to pay additional money for gasoline either, but we submit that it is not the dealer who is responsible for these increased prices. As a matter of fact, our gross margins, while they were compared with 1972 by Dr. Dunlop, and it was stated that we had about eight-tenths of a cent increase in gross margin to July of 1973 over the average of 1972, if you go back to 1971 you will find that that increase was only about three-tenths of a cent a gallon and contributed less than 1 percent to the increased cost of gasoline. And I think the figures definitely indicate that the increased cost of gasoline is a result of increased wholesale prices.

Now, we had a great deal of difficulty getting relief, and the Cost of Living Council represented to the court at the time of our lawsuit that they had an elaborate monitoring system which would allow them to act swiftly so that the dealer would not be hurt by increased wholesale prices and that they could move quickly.

The truth is that they did develop some survey forms—I think they were known as gasoline and diesel oil survey forms—and they were to be distributed. Well, it turned out apparently——

Senator MATHIAS. Did the Council call it an elaborate monitoring system?

Mr. BINSTED. As I recall it, yes. The Justice Department attorneys mentioned it to the court that they had this monitoring system that would protect us and to counter our argument that we must have automatic passthrough.

Now, the truth is they sent to our office in Pittsburgh, Pa., after we told them that we couldn't handle them, 60,000 of these forms for us to distribute to our members at our cost. Now, these forms arrived about September 20, keeping in mind that they were supposed to be back into the Cost of Living Council by September 25. We would have had to truck freight them all over the country to our affiliated associations, have our affiliated associations have their mailing services get them out to their members, and then get them back to the Cost of Living Council by the 25th, and we told them that this was absolutely impossible to accomplish for them. So they then asked us if we would bring to the attention of our members that these forms were available at IRS offices. I suggested that they get this information to the dealers themselves. They said they did not have a mailing list and could they use ours, and I said, no, you can't use ours, and so what we said is we will tell our members that they are available at the various IRS offices.

Well, the truth is, they were not. On Thursday, the 20th, and Friday, the 21st, even here in Washington, D.C., I found that forms were not available at IRS offices. They were not available until Friday afternoon in Detroit, probably one of the worst hit areas as far as phase 4 regulations were concerned, because they had been involved in price wars. And it was almost a Keystone Kops atmosphere in Tucson, Ariz., the executive director called me, said he was having a meeting, could we get them some of the forms. I said I'll see what I can do. I called the Cost of Living Council. I think they airfreighted them out of Dallas to Phoenix and had an IRS car drive them to Tucson or something in order to get them there for the meeting. I think it was Friday night. I don't recall.

Now, we had quite a number of dealers that were able to obtain the form, but most of them couldn't complete them and get them sent in or mail them until Saturday, and we found a lot of them then by Wednesday, Tuesday, or Wednesday, or Thursday, getting back by return mail the unopened envelope marked "Post Office Box Closed." So that it was never received by the Cost of Living Council.

Now, I don't know how many forms they had to act on, but they assured us that they could not act until they got this information compiled and that was the reason for the delay and actually if the President had not insisted, I don't believe we would have gotten the relief for at least another week.

As to relief, seeking relief through the use of S-16 forms, we found that in many instances these forms also were not available, there seemed to be some differences in the opinion of IRS officers across the country as to just what is required. Some IRS officers saying just fill out the top half of the form and if you have a wholesale price increase we will immediately give you at least up to a cent relief. Other IRS officers are insisting that the form be filled out completely with all the attendant forms and 3 years of profit and loss statements, and then probably 2 to 3 weeks before action is taken; and we just believe that the dealer cannot survive under these circumstances.

What we have asked the Congress for, and what we will continue to ask the Congress for today under a bill that is being heard today is that we have automatic passthrough of any wholesale price increases on a dollar-for-dollar basis. We are not asking for any additional revenues for ourselves but only the relief of passing through the wholesale prices as they are passed on to us, and we ask that the Cost of Living Council be instructed by the Congress to attack this problem at its source.

Senator MATHIAS. I am interested in your statement that a member of the staff of the Cost of Living Council indicated that by controlling the retailers and not the wholesalers, they could build backpressure on the companies.

Mr. BINSTED. Yes, sir. This was—he explained to me the economic theory of back pressure which would prevent the wholesale price from increasing or at least slow it down, and we told him that in the first place, we should not be used as a device to help them accomplish their job, and second, that if he believed that to be a fact, that he didn't understand petroleum marketing.

Senator MATHIAS. Was this the policy of the Cost of Living Council? Was it enunciated as the view of the member of the staff you were talking with, or was it spelled out as being the Council's considered policy?

Mr. BINSTED. Well, it came to us pretty firmly by Mr. Charles Owens who, I believe, is the Director of Energy group, and I am not sure whether he initiated the theory or whether it came from the Council or from Dr. Dunlop, but we were told pretty firmly that that is exactly what they intended to do.

Senator MATHIAS. To your knowledge, are the gasoline retailers the only small businessmen who have not been given the benefit of the exemption?

Mr. BINSTED. I think that probably extends in our industry now to the jobber, which is essentially the same thing. He is a wholesaler and many times a retailer also, and the diesel fuel types who sell diesel fuel as well as gasoline. But they are essentially the same type of operation and, to my knowledge, they are the only ones.

Senator MATHIAS. Was this one of the elements of your appeal for some judicial relief?

Mr. BINSTED. That was; yes, sir.

Senator MATHIAS. Denial of due process?

Mr. BINSTED. Yes, sir.

Senator MATHIAS. Equal protection?

Mr. BINSTED. Yes, sir.

Senator MATHIAS. I am interested in your analysis of the margin problem that has been allowed. Did your association develop any figures which would establish an average break-even margin?

Mr. BINSTED. We have, and it does vary, and it is very difficult to deal in averages for the United States because you will find in one major metropolitan area substantially more is required than it is in maybe a small Midwestern town or something like that, and that is the danger of dealing—

Senator MATHIAS. Labor, taxes, transfer, all the rest, of course, will affect that.

MR. BINSTED. Yes. So that was the reason we wanted it tied to price as it is now, May 15, to the ceiling price at that time, rather than on arbitrarily determined gross margins by the Cost of Living Council, because gross margin does not necessarily indicate what your net will be, and that is what they had tied it to initially with the January 10 date. It was our August 1 purchase price plus our January 10 gross margin to arrive at a ceiling price.

Senator MATHIAS. So that that overlooked the various elements which go into establishing cost of doing business?

MR. BINSTED. It did; yes, sir.

Senator MATHIAS. And was there any receptivity to absorbing—it would seem to me to be pretty fundamental information in establishing what it costs to deliver a product to the consuming public.

MR. BINSTED. We have established some charts. We had two associations in particular from different areas to do it. We have done another one from the Maryland area. We had the association from Georgia, which—they had an accounting firm that handles 300 service station accounts, I believe, around the Atlanta area in Georgia, and they did it at random and they found that it was nearly a cent increase just from January to June in wage costs to the dealer. And in Michigan the margin and costs were established in a quite lengthy chart for the Cost of Living Council there. We did present that information to them.

In addition to this, we presented to the court and to the Cost of Living Council a chart done by, I think, it is Barber Associates—a group of economists here in Washington who did a study for us on this and indicated what our nonproduct cost increases were during that period of time.

However, the Cost of Living Council insisted on using 1972 as a base to establish what our margin was then and they said that the average margin for the country was 6.74 percent as opposed to about 7.6 percent in July of this year, indicating about an eight-tenths increase in wholesale price or 13 percent increase in margin, but less than 2 percent increase in overall costs.

Now, the problem with that was that 1972 was somewhat of a depressed year with many price wars; and for 1971, I think that Dr. Dunlop's own exhibit to one of the court papers indicates that we had about a 7.3 percent margin back in 1971. So they are asking us to go back to 1971 as far as nonproduct costs are concerned and also absorb wholesale price increases, and we just cannot do it.

Senator MATHIAS. Of course, as I stated in the opening remarks, we are interested in procedures and the access of the public to some relief under the operations of the Cost of Living Council. Is the Council really an effective tool for giving the public relief from inflationary pressures or is it creating problems of its own?

Now, you referred to the survey which the Council undertook of your industry and the difficulties even to the point that they apparently hadn't made adequate provisions for receiving mail.

MR. BINSTED. I believe that the post office box was probably closed by Tuesday and there was difficulty getting the mail there from Saturday to Tuesday. But I don't see how they could expect to get adequate information if they didn't have the tools necessary available for that except 4 days in advance, 2 of which were weekends, and I

think that was the problem there, that they just were not adequately set up to do it.

Senator MATHIAS. What was the effect on your members of having compiled the information to complete the survey and then getting it back saying the post office box was closed?

Mr. BINSTED. Well, some of them were quite upset by it and I know that in some cases they sent these envelopes to members of Congress. I know that some were sent to Representative Gude. I have a letter here—this was on Call Carl, Inc., attempting to get forms here in Washington, and the difficulty they had obtaining them, that it—a telephone call this morning at 10:30 a.m. to the same office.

Now, that was apparently on the 21st. The letter was written and they had still not received the special forms. That was on the 21st. And this is in Washington, D.C., where they should have had the forms available. And Call Carl, Inc. went on to indicate the number of stations they operated and that they just did not get the information to the Cost of Living Council in time since the forms were not available to them.

Now, I think the one thing that is significant, I believe the Cost of Living Council has about indicated that they can't control the wholesale price except to a very limited degree because of the short supply situation that we are faced with, and the fact that they understand that the cost of foreign crude is going up, and they have allowed price increases in domestic crude. If in fact the price must be held down, all we are saying is do it at the source. Don't use us as a tool to do it for them because, first of all, it will not work. And second, it creates an unbearable hardship on those that they are asking to do their job for them.

Senator MATHIAS. Well, thank you very much, Mr. Binsted. I think it might be useful for the committee to have copies of the survey forms as a part of this record, and I will direct the staff to obtain those. I hope we have better luck in getting them than your members did. And they will be admitted in the record at this point.

[The forms referred to follow:]

Cost of Living Council

2000 M Street, N.W.
Washington, D.C. 20508

SPECIFIC INSTRUCTIONS FOR COMPLETION OF RETAIL GASOLINE AND DIESEL SURVEY

PART I—Identification Data

Item 1. Leave blank

Item 2. Date of Survey—Enter the date this form is completed.

Item 3. Type or Retail Outlet—Indicate by placing a check mark in the appropriate box, the type of station to which this form applies.

Item 4. Name of Retail Outlet—Enter the name of the outlet (not just the brand name).

Item 5. Address—Enter the address of the retail outlet to which this form applies.

Item 6. Brand Name—Enter the brand name applicable to the product being sold at this retail outlet.

Item 7. Ownership Characteristics—Indicate, by placing a check mark in the appropriate box, the ownership characteristics of the retail outlet to which this form applies.

Column (a). Type of Product—Explained above.

Column (b). Gross Selling Price—Enter in this column, with respect to the various products listed in column (a) the pump price applicable to the sale of one gallon of the product listed in column (a). This selling price should normally be the price posted (or listed) at the pump. It should be the price which was charged to the standard variety of retail customer on the date specified.

Column (c). Less All Taxes—Enter in this column, all taxes applicable to the sale of one gallon of the product listed in column (a). This includes, excise taxes and any other type of tax which may have been levied with respect to sales transacted during the dates specified.

Column (d). Adjusted Selling Price—Enter in this column the result obtained by subtracting the figures in column (c) from those listed in column (b) with respect to the various products shown in column (a).

Column (e). Less: Net Purchase Price—Enter in this column the price paid with respect to one gallon of each of the various products listed in column (a). This price must be exclusive of all taxes but include any charges that may be applicable to the transportation of the product from the supplier to this particular retail outlet.

Column (f). Gross Margin—Enter in this column the result obtained by subtracting the figures in column (e) from those listed in column (d) with respect to the various products shown in column (a).

Column (g). Octane Number—For purposes of this survey, octane number means the number obtained by the process referred to in the Phase IV Posting Requirements for Gasoline and No. 2-D Diesel Fuel and is generally described as the octane number derived from the sums of research (R) and motor (M) octane numbers divided by two.

Column (h). Posted Ceiling Price—This column is applicable with respect to the completion of only one of the periods of measurement—6. Current Prices And Purchase Costs. Prices shown in this column are to be taken directly from the authorized stickers which have been completed in accordance with the instructions contained in the Phase IV Posting Requirements for Gasoline and No. 2-D Diesel Fuel.

PART II—PRODUCT INFORMATION

For items 1 through 6 the method of calculating the required data is generally consistent. Consequently, the following instruction shall be applicable to each of the six periods of measurements:

Item 1. Premium Gasoline—Is considered to be that particular grade (recognizing that there may be a certain permissible octane range applicable to the classification of "premium gasoline" and not a specific octane number) of gasoline which has customarily been sold as premium grade relative to this retail outlet.

Item 2. Regular Gasoline—Is considered to be that particular grade (recognizing that there may be a certain octane range applicable to the classification of "regular gasoline" and not a specific octane number) of gasoline which has customarily been sold as regular grade relative to this retail outlet.

Item 3. Low Lead Gasoline—Is considered to be that particular grade (recognizing that there may be a certain permissible range within which one may consider a given grade of gasoline as being low lead) of gasoline which has customarily been sold as low lead gasoline relative to this retail outlet.

Item 4. Diesel Fuel—The particular type of diesel fuel to which this form applies, is that type suitable for use in high speed engines with relatively uniform speeds and highloads. Within this classification would be the grade of diesel fuel used by various types of (1) farm equipment and (2) other motor vehicles.

PART III—Certification

This is a two-part certification. The first part applies to the individual responsible for the completion of the survey and the second part refers to the fact that a certified public accountant, or a public accountant, must certify with respect to the information provided. Both individuals must sign the survey above their typed names.

ECONOMIC STABILIZATION PROGRAM

RETAIL GASOLINE AND DIESEL FUEL SURVEY

Part I—Identification Data

1. Identification Number (To be filled in by C.O.L.C.)				4. Name of Retail Outlet			
2. Date of Survey Month Day Year				5. Address: Street City State Zip Code			
3. Type of Retail Outlet: (Check one) ☐ Major Brand ☐ Secondary Brand ☐ Independent Brand				6. Brand Name			
7. Ownership Characteristics (Check one)							
☐ Dealer Owned and Operated ☐ Leased from Major ☐ Major Co. Owned and Operated ☐ Leased from Jobber ☐ Jobber Owned and Operated ☐ Leased from Independent ☐ Independent Supplier Owned and Operated							

Part II—Product Information (Provide the following information with respect to each of the requested dates)

3. January 10, 1973

Type of Product (e)	All prices expressed in cents per gallon					
	Gross Selling Price (b)	Less All Taxes (c)	Adjusted Selling Price (Col. b — Col. c) (d)	Less Net Purchase Price (e)	Gross Margin (Col. d — Col. e) (f)	Octane Number (g)
(1) Premium Gasoline						
(2) Regular Gasoline						
(3) Low Lead Gasoline						
(4) Diesel Fuel						

2. May 15, 1973

Type of Product (e)	All prices expressed in cents per gallon					
	Gross Selling Price (b)	Less All Taxes (c)	Adjusted Selling Price (Col. b — Col. c) (d)	Less Net Purchase Price (e)	Gross Margin (Col. d — Col. e) (f)	Octane Number (g)
(1) Premium Gasoline						
(2) Regular Gasoline						
(3) Low Lead Gasoline						
(4) Diesel Fuel						

3. June 13, 1973

Type of Product (e)	All prices expressed in cents per gallon					
	Gross Selling Price (b)	Less All Taxes (c)	Adjusted Selling Price (Col. b — Col. c) (d)	Less Net Purchase Price (e)	Gross Margin (Col. d — Col. e) (f)	Octane Number (g)
(1) Premium Gasoline						
(2) Regular Gasoline						
(3) Low Lead Gasoline						
(4) Diesel Fuel						

4. August 1, 1973

Type of Product (a)	All prices expressed in cents per gallon					
	Gross Selling Price (b)	Less All Taxes (c)	Adjusted Selling Price (Col. b — Col. c) (d)	Less Net Purchase Price (e)	Gross Margin (Col. d — Col. e) (f)	Octane Number (g)
(1) Premium Gasoline						
(2) Regular Gasoline						
(3) Low Lead Gasoline						
(4) Diesel Fuel						

5. September 1, 1973

Type of Product (a)	All prices expressed in cents per gallon					
	Gross Selling Price (b)	Less All Taxes (c)	Adjusted Selling Price (Col. b — Col. c) (d)	Less Net Purchase Price (e)	Gross Margin (Col. d — Col. e) (f)	Octane Number (g)
(1) Premium Gasoline						
(2) Regular Gasoline						
(3) Low Lead Gasoline						
(4) Diesel Fuel						

6. Current Prices and Purchase Costs

(Date of Survey)

Type of Product (a)	All prices expressed in cents per gallon						
	Gross Selling Price (b)	Less All Taxes (c)	Adjusted Selling Price (d)	Less Net Purchase Price (e)	Gross Margin (f)	Octane Number (g)	Posted Ceiling Price (h)
(1) Premium Gasoline							
(2) Regular Gasoline							
(3) Low Lead Gasoline							
(4) Diesel Fuel							

Part III—Certification

I hereby certify that the above information is true and accurate.

Typed name and signature

Relationship to Dealer

Position

Telephone No.

Certified Public Accountant or Public Accountant

Typed name and signature

Address

Mail to: Energy Division, Cost of Living Council, Retail Outlet Survey, P.O. Box 19188, Washington, D.C. 20036

Senator MATHIAS. Thank you very much.

Mr. BINSTED. Thank you for the opportunity.

Senator MATHIAS. The committee will now call Mr. Edward Dunkelberger, who is a member of the firm of Covington & Burling.

Mr. Dunkelberger, we appreciate your being here.

**STATEMENT OF EDWARD DUNKELBERGER, ATTORNEY AT LAW,
ACCOMPANIED BY JOHN HODGES, ATTORNEY AT LAW, COVING-
TON & BURLING, WASHINGTON, D.C.**

Mr. DUNKELBERGER. Thank you very much.

My name is Edward Dunkelberger. I am a member of the firm of Covington & Burling of Washington, D.C., and have spent a substantial amount of time over the past 26 months advising the representing companies that have been subject to the various and varying requirements of the economic stabilization program. With me is John Hodges of our firm, who has devoted all of his time—I might say 150 per cent of his time—in the last year and a half working in this incredibly complex and rapidly changing area of the law.

I welcome this opportunity to testify on the procedural aspects of the economic stabilization program, and commend this subcommittee for focusing on this important but insufficiently explored aspect of the program. Press coverage of the economic stabilization program has been confined almost exclusively to the economic wisdom—or absence thereof—of particular steps taken by the President and by the control agencies that from time to time have been delegated authority by him to carry out the program.

A partial explanation for the lack of public comment on these procedural issues is the complexity and subtlety of the practical problems necessarily attending any effort to stabilize the economy. I am convinced, however, that the very viability and the overall success of the economic stabilization program depend in significant part on the fairness—both actual and as perceived—with which the controls are arrived at and administered. While we should not in any sense minimize the practical difficulties which inhere in the present effort to correct the economic dislocations which have recently characterized our economy, neither can we allow the magnitude of those difficulties to lull us into accepting as an administrative *sine qua non* a procedure which contributed to substantive inequity and, equally importantly, to a sense of inequity among the regulated.

Looked at in this way, the procedural fairness of a regulatory program is fundamental to, rather than interferes with, the effective operation of substantive controls. At the very outset of the imposition of phase I the President proclaimed his intention to focus primarily on such factors as expedition, simplicity, and effectiveness of controls, as contrasted with such factors as procedural regularity, administrative fairness, and controls tailored to the particular circumstances in each industry. This approach of the President, of publicly and affirmatively disclaiming the intention of establishing a bureaucracy that would be necessary for a more equitable system of controls—has contributed in large measure, I believe, to the continuing and pervading lack of confidence in and acceptance of the controls by the regulated industries. In short, economic controls without the fact and appearance of fairness cannot be expected to receive the degree of acceptance by industry that may be necessary if the program is to achieve the stated goals.

At this point I should emphasize that my remarks today are not intended as a scatter gun indictment of the work which has been done by the Council or its staff. The Council has been laboring under tremendous pressure to place inflation under effective control. It seems appropriate, however, for those of us in the legal profession to give very serious consideration to certain aspects of the control program which, in an effort to achieve commendable ends, have been too long ignored.

My comments are on the following issues:

- (1) The tendency of the economic stabilization agencies—at least until recently—not to provide an opportunity for public participation and comment on proposed rules;
- (2) The tendency to make rules promulgated under the program retroactive in effect;
- (3) The problem of the enforcement of vague substantive standards;

- (4) The use of the Cost of Living Council of triple penalties which have no apparent basis under the Economic Stabilization Act;
- (5) The use of nonpublic rules for decisionmaking which are unavailable to those who are regulated;
- (6) The alleged power of the Council to ignore its own rules;
- (7) The use of procedures to place companies under economic coercion; and
- (8) The enormous administrative burden on companies in complying with complex and frequently changing rules.

I. PUBLIC PARTICIPATION IN RULEMAKING

One of the distinguishing features of the economic stabilization program has been its end run around the requirements for public comment and participation in rulemaking, at least until the past few months.

Congress did not subject the economic control agencies to all of the requirements of the Administrative Procedure Act (5 U.S.C. 551 et seq. (1970)), but it did reject an administration proposal to exclude such agencies entirely from the safeguards of the APA. Instead, it made certain provisions of the APA applicable, specifically including those governing the rulemaking process. (5 U.S.C. 553 (1970).) The rulemaking section of the APA requires that notice of proposed orders and regulations of general applicability be published in the Federal Register. Interested parties are then given an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. (5 U.S.C. 553(c).)

Instead of observing these requirements, there has been a strong tendency—until very recently—to avoid them by prefacing new regulations with boilerplate language that public comment is impracticable since there is an immediate need for guidance as to policy. There is indeed an exception in the APA to the general rule on public comment because of impracticability. But the wholesale use, or abuse, of this provision has caused the general rule to be swallowed in the exception. Furthermore, the widespread use of this technique of avoidance of public comment not only is unfair, but can prove to be quite embarrassing to the agency involved, and can have the effect of undermining the agency's effectiveness in achieving its goals.

A prime example of what I am talking about is the Pay Board's experience with merit pay increases. On or about Thanksgiving 1971, the Pay Board announced a policy which provided radically different treatment for merit increases depending on whether or not the increase was under a plan subject to a labor agreement. The Board ruled that where no labor agreement existed the plan was subject to the 5.5-percent standard. Where such an agreement existed, the plan would not be subject to the 5.5-percent standard.

Perhaps this was a well-thought-out policy decision. The public reports indicate otherwise.

The New York Times quoted one business member of the Pay Board who described the process of the regulation's promulgation as follows:

We really didn't realize what we were doing when we took the original vote on merit pay. We had been arguing all day and it was 3 o'clock in the morning and we still hadn't reached a decision.

Then [a business member of the Board] went out into the hall and scribbled the proposal on a piece of paper. We were so tired that we voted to accept it without realizing it was inconsistent with our own rules of equity.

Some Pay Board members clearly did not know what they had voted for since they proceeded to state publicly an understanding of the rule contrary to the text of the rule.

However, despite the haphazard promulgation of this rule, which apparently was contrary to the intent of the Board, the regulation appeared in full bloom immediately thereafter in the November 25, 1971, Federal Register. (36 F.R. 22581.) The preamble said that the new regulation was being issued without regard to the APA's rules on notice, public procedure, and effective date "[b]ecause of the need for immediate guidance from the Pay Board." The new rule was made not merely effective immediately, but effective November 14, 1971, 11 days prior to its appearance in the Federal Register.

Had an opportunity been given for public comment, however brief, there would at least have been an opportunity for greater consideration of the wisdom of this rule, which clearly made an unwarranted and unfair discrimination among merit plans. Although the matter was finally resolved at a later time, the damage to the prestige and effectiveness of the Pay Board by this incident was significant. One can only conclude that the public interest and the interest of the agency itself would both have been served by adherence to the intent of the public comment provisions of the APA.

Despite the lesson which should have been learned in this instance, the practice of promulgating rules without opportunity for public participation continued to prevail, with only occasional exceptions, until quite recently.

I might add that I toyed with the idea of either John or me going through the Federal Register for the last 2 years and making an actual count of the number of times that this exception proviso was invoked by the regulating agencies. It just so happened that neither one of us had the time to look at every page of the Federal Register over 2 years, but I think it would have disclosed a very, very high figure.

The Office of Emergency Preparedness in phase I, the Pay Board and the Price Commission in phase II, and the Cost of Living Council in phases I, II, III, and freeze II invariably avoided public comment by stating that summary procedures were employed in order to provide immediate guidance as to agency policy.

For example, another instance of questionable rulemaking because of the lack of public comment is the Price Commission's change in policy relating to the treatment of interest expense. On September 8, 1972, the Price Commission issued a press release announcing an important change in policy with respect to its treatment of long-term debt interest expense for profit margin purposes—Price Commission Release No. 134. Although the policy affected almost every firm not exempt from controls, it was never promulgated in proposed form, but was announced as a *fait accompli* with no formal opportunity given for public comment.

This practice continued into phase III. For example, on March 29, 1973, when the ceiling on meat was announced, a little-noticed regulation was also issued by the Cost of Living Council which required most pay increases affecting employees in the food industry to be pre-

notified—38 F.R. 8506. This rule purported to affect even minimal increases affecting tiny employee units. The rule, of course, was enormously burdensome to both the Council and to the food industry. Apparently realizing the problem it had created, the Council later amended the rule to delay its full impact until August 1—38 F.R. 9825, April 20, 1973. The deadline was further extended, this time to November 1, 1973—38 F.R. 19682, July 23, 1973.

Once again, let me emphasize that public participation in the promulgation of regulations and development of policy is not a luxury to be tolerated by Government only when the program is not important or when ample time is available. The suggestion that the economic stabilization program and the fight against inflation are too urgent to be hampered by orderly administrative procedures totally misses the point that public participation provides immeasurable benefits to the regulatory agencies.

I would like to add here, every aspect of our economy is regulated—as to health questions, economic questions, safety questions—by any number of the agencies that have been created by Congress and by the executive. In all of these, generally, orderly administrative procedures are followed. Just why it was thought that the fight against inflation was so much more important that it justified totally ignoring these procedures, I will never understand.

Senator MATHIAS. Since you have interrupted yourself, I will interrupt you further.

Mr. DUNKELBERGER. Go ahead, sir.

Senator MATHIAS. And I say that I couldn't agree with you more. At the time of the extension of the Economic Stabilization Act I offered an amendment providing for public hearings in the case of petroleum allocations. I think that this is a vital feature. I think we ought to write it into really all of the programs by which the Congress delegates extensive authority to the President. At this moment, specifically, I have in mind the Trade Act which is coming up which is a very similar operation in its effect on business, and on the public, the consuming public, and there ought to be an opportunity for public comment before the executive acts are taken which affect everybody's lives so intimately.

Mr. DUNKELBERGER. Senator, I couldn't agree with you more in that respect. I think both the regulated parties, who have obviously a great amount at stake in the area of regulation, and the public should have an opportunity to come in and participate in the development of these policies which are going to govern their activities and govern their pocketbooks so directly.

What I have said is not intended to minimize those instances in which public comment has been sought. In 1972 the Pay Board published in the Federal Register a proposed recodification of its regulations and gave ample opportunity for comment prior to the issuance of final revised regulations. Undoubtedly that procedure resulted in better regulations and better government.

The Cost of Living Council has published most of phase IV of its price regulations and executive and variable compensation pay regulations in proposed form and has given the public an opportunity to comment on them. Indeed, the efficient procedural manner in which the CLC has handled the phase IV regulations—with an opportunity

for public comment, and modification of the regulations in the light of the comments—underlines the absence of a reasonable justification for the agencies' failing to follow the APA in the past.

I would like to underline that point. Under Mr. William Walker, general counsel of the Cost of Living Council, there has been a far greater degree of adherence to the public participation procedures of the APA. As I have indicated in my prepared testimony, the very reliance and adherence of the CLC to those procedures emphasizes that the excuses that have been given to the public and to companies in the past 2 years as to why they could not be adhered to were meaningless and really had no basis whatever in fact, law, policy, or theory.

II. RETROACTIVITY OF RULES

I now turn to a related issue: The tendency of the economic stabilization agencies to make rules retroactive in effect. This is usually done on the grounds that there is good cause for making the regulations effective not less than 30 days after publication in the Federal Register. The Pay Board's regulations on executive and variable compensation, published in the Federal Register on February 15, 1972—37 Fed. Reg. 3357—were made effective as of November 14, 1971, on such grounds. Similarly, when the Cost of Living Council on March 6, 1973, extended the jurisdiction of the Construction Industry Stabilization Committee to encompass certain nonconstruction operations covered by construction collective bargaining agreements—38 Fed. Reg. 5995—the Council made its regulations effective as of January 11, 1973, 54 days prior to publication of the amendment in the Federal Register.

Other regulations have been made retroactive in effect, rather than in form. For example, in the Cost of Living Council Form CLC-2, published in the Federal Register on May 7, 1973, long-term interest expense for the fiscal year must be treated as an operating item. This change came about far into the fiscal year of many companies that were then operating under a contrary rule previously in effect with respect to that fiscal year. We know of at least one firm with a fiscal year ending on May 31, 1973, a mere 3 weeks after the CLC-2 was announced, whose entire year had been planned and carried out under the contrary prior rule.

Such efforts to make amendments effective retroactively are unfair and of highly dubious legality. Courts have regularly refused to give retroactive effect to rules and regulations in such circumstances.

III. ENFORCEMENT OF VAGUE STANDARDS

A third procedural issue relates to the fairness of promulgating vague so-called voluntary standards for conduct, such as we saw under phase III of the program, coupled with threats of retaliation should the standards be disobeyed. I believe that it is important to focus on this issue despite the fact that we are no longer in phase III, at least with respect to price, since a phaseout of controls might include something similar to phase III.

Phase III was presented as a voluntary program in which companies, according to Secretary George Shultz would be "clobbered" with a "club in the closet" if they did not obey the standards. The club in the closet threat was a deliberate one which was often repeated by

those in authority. At one point it escalated to being a "shotgun in the closet."

This concept of voluntary controls enforceable at will by the Government is, in my view, intolerable as a legitimate means of economic control, and is made worse by the vagueness of the phase III standards. The general price standard, for example, merely provided that companies may raise their prices to reflect increased costs. The concept of cost was never clearly defined until May 7, 1973, the day the Cost of Living Council Form CLC-2 was issued. By this time, companies had already gone through 1½ and one fiscal quarters. In the interim, the phase III standard merely provided that the phase II regulations were superseded but were "to serve as a guide in applying the phase III * * * standards." Elsewhere it was stated that "the policies and principles contained in phase II regulations can be used in applying the standard." Did the word "can" mean "may," "must," or something else? Furthermore, the rules went on to provide that increases in phase III must not be unreasonably inconsistent with the phase III standards or goals. Apparently, reasonable inconsistency might be allowed. But what if a company guessed wrong about what would pass muster? George Shultz might jump out of the closet and clobber it.

Typical of the confusion concerning standards is the issue of the viability of the 5.5-percent pay standard, which remains as a voluntary and self-administered guide for most segments of the economy. Earlier in the year, there were several contradictory statements from the Council in this matter and it has never been entirely clear whether the 5.5-percent standard is a standard, a guideline, a goal, a hope, or a fraud. The lack of certainty on the issue almost certainly tends to lessen respect for Federal regulation in general.

I would like to add here that it is difficult to comprehend the degree of uncertainty that surrounds this voluntary pay standard. Companies time and again ask. "Are we regulated or are we not regulated?" and really Mr. Hodges and I find it impossible to answer that with any degree of precision.

I sincerely doubt whether any Government program should be run on the basis of a company being "clobbered" for failing to comply with a vague, voluntary standard. Such a system is inherently unfair. And it is all too easy for such an approach to be abused. I am not suggesting that such abuse has occurred under the economic stabilization program. I am not aware of any "enemies list" or favoritism at the Cost of Living Council, and I believe that the phase III regulations were administered honestly and as fairly as the regulations allowed. But the regulatory scheme itself was susceptible to abuse, and led many businessmen to conclude, perhaps wrongly, that the Government did not really mean what it said.

IV. TRIPLE PENALTIES

Another aspect of the program which has caused concern is the practice of the Cost of Living Council, and the Price Commission before it, to impose triple penalties on companies which exceed their allowable profit margins for a fiscal year. (See 6 CFR sections 155.176, 155.177, 300.54.) That practice has no support whatever in the act itself, which specifically prescribes the sanctions for violations: A fine

of not more than \$2,500 for each violation and \$5,000 for each willful violation. (Economic Stabilization Act, as amended, section 208.) Section 210 of the act provides that an individual may bring an action for three times the amount of an overcharge, and the legislative history of the act establishes that such an action is reserved to private parties and is not available to the Government. The report of the Senate Committee on Banking, Housing and Urban Affairs, which reported out the 1971 amendments to the act, states that the treble damage action "is intended to be brought by private persons against other private persons. The Government will not bring such action nor be the subject of one." (S. Rept. No. 92-507, 92d Cong., 1st sess. at 9.)

In light of the clear language and intent of the act, it is difficult to understand how the Council considers itself as having the power to impose the treble damage sanction. One can only speculate that companies have generally not been willing to disregard treble damage orders by the Council because of the fear that their ongoing relationships with the agencies might be severely damaged.

V. SECRET RULES

Another area of concern relates to the existence of rules or criteria which affect the public but which are known only by the Council or the Internal Revenue Service. Under this "desk drawer" approach to government, a citizen may have his rights decided on the basis of criteria of which he is unaware and which he has no effective opportunity of refuting.

We do not know how widespread the use of such materials is—because of their very nature they are secret—but we do know it exists. Only last week we represented a company that was called before the Internal Revenue Service to explain its conduct during the freeze. The company presented numerous arguments as to why it was in conformity with the regulations, supporting its views with citations of published rulings of the IRS during phase II. The IRS district conferee, however, read to us from what he referred to as an "internal Q&A" which seemed to go against the company. We understand that there may also be internal guides relating to the criteria which should be met in order to obtain an exception to the regulations.

There would seem to be nothing more basic to good government than a requirement that a citizen not be regulated by and subject to rules or interpretations that are not disclosed. The courts have begun to recognize the rights of citizens to this kind of material. See *Long v. IRS*, 339 F. Supp. 1266 (W.D. Wash. 1971); 349 F. Supp. 871 (W.D. Wash. 1972); *Tax Analysts and Advocates v. IRS*, U.S. Tax Cases p. 9481 (D.D.C. 1973).

The publication of these criteria would serve both the public and the economic stabilization program. It would inform companies of what they are expected to do to be in conformity with the requirements of the program. At the same time, it would enormously ease the administrative burden on the Council and the IRS caused by numerous inquiries concerning compliance.

I would like to add that we welcome the advances that this committee has already made in that regard and the assurance that at least some of these materials will be made publicly available by the Council.

VI. POWER TO IGNORE ITS OWN RULES

Another concern is the alleged power of the Council to ignore its own regulations and to deny or hold up increases which meet all the Council's criteria for approval, such as cost justification and profit margin compliance, but are deemed "unreasonably inconsistent with the goals of the economic stabilization program." (6 CFR sec. 150.154 (c). There was a similar provision in phase II. See 6 CFR sec. 300.60.)

I do not understand how a price increase which is otherwise in compliance with the Council's regulations could be deemed "inconsistent" in this manner. This broad reservation of power is apparently intended to permit the Council, when it sees fit, to disregard its own regulations. The exercise of such power totally undercuts the detailed framework of the regulations and published rulings, and leaves the affected company with no recourse against arbitrary action. Judicial review is obviously meaningless when an agency purports to operate under such a provision.

VII. ECONOMIC COERCION

A related problem relates to the great potential for economic coercion which can be wielded over companies through the use of procedural delays. In the announcement of these hearings the chairman noted that enormous power is granted to "a small group of men whose decision can make or break any business in America." We have seen this done in such a way that the decision of the authorities is practically unreviewable by a court. In 1972, for example, the Price Commission approved a request of a company for a price increase. It then changed its mind, and suspended the increase of the company in order to study the entire industry. The Commission raised a number of questions concerning the propriety of the price increase it had previously granted. The company refuted each point raised by the Government, but it was informed that it had two choices: It could withdraw its original request and consent to accepting a much smaller price increase, or the Price Commission would continue its study into the indefinite future, during which time the major part of the company's request would be suspended. In the light of the company's immediate and desperate need for price relief, it capitulated and accepted the smaller increase. The acceptance of the smaller amount probably effectively precluded judicial review of the Government's position with respect to the original request. Professor Kenneth Davis has commented on this kind of coerced consent:

"In all such cases the regulated party consents and cannot complain. But to argue that consent should bar further protest is not the same as concluding justice is necessarily done. On the contrary, the opportunity for arbitrary action is extraordinary * * *." 1 K. Davis, *Administrative Law*, Sec. 4.06 (1958).

VIII. BURDEN OF COMPLIANCE

Finally, I should not conclude without emphasizing the obvious—the burdens of compliance with the economic stabilization programs have been enormous. The rules are complex and frequently require extensive computer analysis. Once a company has finally established

a procedure for compliance under existing rules, the rules tend to change. So far we have been through a freeze, then mandatory price and wage controls, then a voluntary set of rules, then another freeze, and then a new set of mandatory price rules. Food companies have even found their most recent phase subdivided into "Stage A" and "Stage B." I am not suggesting that the program should not be flexible to meet changing conditions, but undoubtedly the problems of compliance for all companies have been greatly magnified by the frequent shifts from one regulatory approach to another.

I have dwelled on these procedural problems at some length not in any sense to attack the Cost of Living Council or the IRS. They are clearly competent men working under enormous burdens to carry out a difficult assignment. And in many respects the Council has learned from past experience and is tending to solve some of the problems I have discussed. But it is necessary, I believe, to focus on these procedural issues and to emphasize the fundamental importance of administrative fairness and regularity—to the regulators as well as to the regulated.

I would like to end with a statement by Justice William O. Douglas which summarizes my concerns. He said :

Unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limit on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty.

Senator MATHIAS. Well, I would like to thank you very much, Mr. Dunkelberger, for a very thoughtful and helpful and constructive contribution to the committee's hearings. I would agree with you in your expression of concern in the absence of very firm rules. In a legislative body like the Congress, the only protection a minority has is in the rules, and if there are not rules and if the rules aren't observed, we can have the tyranny of the majority which is a far cry from our concept of an orderly government of laws.

Mr. DUNKELBERGER. Particularly if the rules reside only in the heads of the people who make the decisions.

Senator MATHIAS. Absolutely.

Can you tell us what are the statutory standards that are to be followed by agencies in economic controls?

Mr. DUNKELBERGER. Well, I hate to sound a sour note here. I must say Congress did not bend over backward itself in establishing the guidelines that were to govern the establishment of economic controls. The authority granted to the President is indeed extremely broad. He can adopt regulations to establish prices, rents, wages, and salaries at levels not less than those of May 25, 1970. That is in section 203(a) of the Economic Stabilization Act. Section 203(b) does have a general requirement that the regulations be fair and equitable—one would hope that would be the case without congressional stipulation—that they provide for the making of general exceptions and variations, take into account changes in productivity, and provide for appropriate reductions when there have been lower costs, but none of these standards really govern the substantive rules.

You have got to remember that in the act the basic authority given by Congress to the agencies, even in the original act before its amend-

ment and now, has remained essentially unchanged. If you look at the different kinds of regulations that have emerged from that authority—including the first freeze, phase II, phase III, the second freeze, and a complete new set of rules in phase IV—it is apparent that the agency does not regard itself as hemmed in very substantially by the congressional directive, and indeed I think that is the case. Whether or not it would be feasible for Congress to spell out substantive limitations I do not know. I am not any kind of an economist and do not know much about economic policy. It might be that the degree of flexibility is necessary if you are going to have this kind of abominable regulation, but that underlines all the more that once you decide upon those substantive rules in the Agency, that decision process must be open to the public for full participation.

Senator MATHIAS. But what you are really saying for the time being is that the statutory standards are too broad to have very much meaning.

Mr. DUNKELBERGER. I don't know what standards the courts can apply. Generally in the cases the courts are groping with an equitable or fairness approach, or with the question of whether the Agency has properly interpreted its own regulations. But there is little if anything that the court can find in the act itself. There is some detail, and some precise points, but generally there is not much in the act that can hem in the Agency.

Senator MATHIAS. So the regulations for all intents and purposes are the creatures of the Agency.

Mr. DUNKELBERGER. Yes, sir. They are. And again, if you would look at the immense variety of controls that have been promulgated, you would see that that is the case.

Senator MATHIAS. Which would underscore again the question that you and I seem to agree on. There is all the more need for public participation in the development of those standards. If they are not statutory, if they haven't been through the mill of the congressional process, therefore they should have been exposed to public comment and to incorporate the benefits of public experience as they are being developed.

Mr. DUNKELBERGER. It is hard to recreate the weird atmosphere of 2 years ago, that has continued up to quite recently. Citizens, companies, and firms that have been so used to other aspects of their activities being regulated through procedures involving public participation found themselves just waiting to see what appeared in the Wall Street Journal, the New York Times, or CLC press releases, and being told what their rights were going to be, and how their businesses were going to be regulated. Indeed, after hearing the comments of the small independent gas stations. I have the feeling that that is the experience that they are living through right now. They are really hanging upon the edicts and pronouncements of the Agency.

Senator MATHIAS. Of course, we are talking again in terms of the procedures by which standards are adopted and not about the equities or the hardships that may result in individual cases.

Mr. DUNKELBERGER. No, no, I realize that, and that is what I was addressing myself to. Even the small gas station people, although they are having some input, are really in the position of sitting and listening

to their futures being decided by an alien agency. I cannot question the wisdom of the substantive controls. It is the absence of public participation that concerns me.

Senator MATHIAS. What difference do you think that participation makes?

Mr. DUNKELBERGER. Participation makes a huge difference.

No. 1, no Federal agency is all wise. It cannot understand all of the complexities of the businesses that it is regulating. The American economy is as diverse as you can imagine, and in trying to come out with general rules applicable to everyone, it is just so clear that there are going to be fundamental mistakes of fact and of policy and theory. If the agencies give those whom they are regulating an opportunity to comment, even though it is recognized that those commenting will be advancing their own personal interests, the comments will point out fundamental mistakes, why the proposed system would not work, and what its unanticipated effects may be, so that the agency can correct its original promulgation without having to amend and amend later on.

No. 2, it puts those regulated into the system itself. If the fight against inflation is as important as it is said to be, it is a fight of all citizens, and they should feel a part of it. If they have participation in the development of the rules they are going to be governed by, then I think you will get greater acceptance of what those rules require.

I tried to make the point in my statement that public participation is not a luxury. It is not a vague general standard of fairness. It really is for the benefit of the program and—as I have said before—the CLC has seen this in its phase IV regulations. The time provided for the opportunity to comment was extremely brief—10 or 12 days—and trying to get trade associations and companies turned around long enough to look at proposals and develop comments was not easy, but comments did get in. I think in many instances they shed light on the proposal and enabled the agency to improve the regulations substantially.

Senator MATHIAS. What do you think the general impact of the economic stabilization program has been on the business community and on the legal community which attempts to guide the hand of the business community in making decisions?

Mr. DUNKELBERGER. Well, one obvious factor to lawyers, I guess, is that it certainly has created an awful lot of business. No doubt about it. Some people have called this the "Lawyers Full Employment Act."

Senator MATHIAS. That is one of the criticisms leveled at Congress since it is composed of more lawyers than any other single body, that it is constantly making work for the profession.

Mr. DUNKELBERGER. It certainly does that, but if you are going to have rights protected there is no way around it. Seriously, in terms of the business community, again, I would not try to evaluate it economically, and I do not understand your question to point at that direction.

One effect it has had, I believe, is that the way the program has been run, it tends to undercut somewhat the respect of companies for all kinds of regulations. At one stage there was expressed a considerable concern about getting the IRS involved in this kind of a program.

If people began to feel that they can make their own decisions because the Government is so vague and maybe doesn't really mean what it says and is not very fair, those attitudes may be transferred over to the administration of the Internal Revenue Code. That would be disastrous because the Internal Revenue Code depends upon a high degree of compliance without enforcement. I generally think that most of our clients are probably more cynical about Federal regulation than they were before, and that may be not all bad.

John?

Mr. HODGES. I might add to this that the burden on corporations is tremendous. I suppose you could call this another hidden cost of the economic stabilization program. The program takes an extraordinary amount of time of the corporate controller, president of the company and of other employees. I run into situations numerous times in which the controller of a company will say that they had geared up for a particular set of regulations and then we sent them out a new set which would impose on a new set of requirements. Certain controllers have said they spent from 40 to 90 percent of their time during the last couple of years working on compliance with the Economic Stabilization program. There may be no way to get around this burden, but it certainly is something that we ought to realize exists.

Senator MATHIAS. Have either of you physically participated in the preparation of, say, form 22, the Cost of Living Council form for whatever time investment is required for that?

Mr. HODGES. Well, this is a very difficult thing for us to assess because outside lawyers come into this process very much at the end of the line. The corporations spend a tremendous amount of time running their computers and preparing the forms, and the lawyers come in at the late stages.

I wouldn't want to hazard a guess as to the number of hours that would be involved in filling out one of these forms, but I think that for a large company it could be at least several hundred hours.

We have seen the PC-1 during phase II. We saw the CLC-2 during phase III, and now we are facing a CLC-22 in phase IV. I have been informed by the CLC that the reason for naming it the "CLC-22" was because of the novel "Catch 22," and I think that this may give some indication of the complexity that form has.

We might add another point which is fairly obvious. The large companies can afford to fill out the forms and do it very well. I think the degree of the burden on smaller companies is tremendous as compared to the larger companies which are really tooled up to do this kind of job.

Senator MATHIAS. Curiously we just received this morning an estimate from the Office of Management and Budget which indicates that form-22 requires an estimated average of 2,000 man-hours per response. We will put it in the record.¹

[The form referred to follows:]

¹ This document is a copy of Office of Management and Budget form 83, required reporting on CLC form 22.

Cost of Living Council

2000 M Street, N.W.

Washington, D.C. 20508

Special Instructions for the Preparation of Form CLC-22 as a Report of Construction Operations

General Instructions

A. Purpose

These instructions are designed to prescribe the rules for the annual report of sales and profit margins pursuant to 6 CFR, Part 150, Subpart N.

B. Who Must Use Form CLC-22

1. **Reporting.** Each firm with \$10 million or more of "annual sales or revenues" from "construction operations" as those terms are defined in 6 CFR 150.452 must report annually to the Internal Revenue Service on Form CLC-22 in accordance with these instructions.

However, a firm is not required to report if:

- (1) it must treat its construction operations as part of its other operations because (i) more than 50 percent of its total annual sales or revenues are from other than construction operations and (ii) the firm cannot separate its construction and nonconstruction operating income, or
- (2) during its most recent fiscal year, the firm derived both (i) 90 percent or more of its annual sales or revenues from the sale of exempt items or exempt sales and (ii) less than \$50 million of its annual sales or revenues from the sale of nonexempt items.

2. **Recordkeeping.** Each firm with more than \$1 million, but less than \$10 million of "annual sales or revenues" from "construction operations" as those terms are defined in 6 CFR 150.452 should place among its records on an annual basis a Form CLC-22 completed in accordance with these instructions.

3. **General Rules.** The following rules apply for the purpose of determining who must use Form CLC-22:

- a. **Determination of "Firm."** If a firm is not directly or indirectly controlled by another firm, that firm is called a "parent" for the purposes of this Form CLC-22. The parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls taken all together, constitute the "firm" for the purposes of paragraphs B.1. and B.2., above.

- b. **Parent and Consolidated Entities.** Once the reporting status is determined, only the sales or revenues of the parent and the sales or revenues of the controlled entities (if any), consolidated with the parent in its financial statements prepared in accordance with generally accepted accounting principles are combined for purposes of preparation of the Form CLC-22 applicable to the "Parent and Consolidated Entities." The Form CLC-22 is prepared by the parent for and on behalf of the entire consolidated group for submission to the Internal Revenue Service.

- c. **Unconsolidated Entity.** In addition to preparing Form CLC-22 for and on behalf of the entire consolidated group, the parent must prepare a separate Form CLC-22

for and on behalf of each unconsolidated entity with annual sales or revenues of \$1 million or more. An "unconsolidated entity" is any entity directly or indirectly controlled by a parent but not consolidated with the parent for purposes of financial statements filed with the SEC or, if the firm does not file such reports, financial statements prepared in accordance with generally accepted accounting principles. An "unconsolidated entity" includes any entity consolidated with that unconsolidated entity for purposes of financial statements prepared in accordance with generally accepted accounting principles.

- d. **Entity.** For purpose of this form and all supporting schedules, entity means the "parent and consolidated entities" or an "unconsolidated entity."

C. When To Submit or Prepare

Firms required to report construction operations must submit and firms required to recordkeep should retain a Form CLC-22 in accordance with these special instructions beginning with the first annual period which ended on or after June 13, 1973. Form CLC-22 must be submitted no later than 90 days after the last day in the entity's fiscal year.

D. What To Submit or Prepare

This form and instructions require only basic information. However, the CLC or the IRS may request additional data in particular cases. Firms must submit two copies of the Form CLC-22 and all other supporting schedules and documentation indicated in these instructions. Firms which submit a Form CLC-22 which contains incomplete or incorrect information will be required to submit a corrected Form CLC-22 and will be considered in violation of the reporting requirements if a complete and correct form is not submitted within the time period prescribed.

E. Where To Submit

Firms required to file Form CLC-22 as a report of construction operations must forward the Form and attachments to the IRS office designated in the table at the end of these instructions.

F. Suggestions for Improvement

The CLC welcomes suggestions for improving this and other forms, and seeks ways of obtaining the information it needs to exercise its responsibilities under Phase IV of the Economic Stabilization Program with the minimum amount of public burden. Suggestions should be submitted to:

Cost of Living Council
Office of the Executive Secretariat
2000 M Street, N.W.
Washington, D.C. 20508

G. Rounding

For purposes of this form, all percentages must be expressed to the nearest two decimal places (such as 15.92%). All dollar entries must be rounded to the nearest \$1,000 and the 000's should be omitted (such as \$1,750,803 entered as \$1,751).

H. Sanctions

The timely submission or retention of a Form CLC-22 by a firm subject to 6 CFR Part 150, Subpart N, as a construction industry report is a mandatory requirement under Phase IV regulations. Late filing, failure to file, failure to keep records, or failure otherwise to comply with these instructions, may result in criminal fines, civil penalties, and other sanctions as provided by law.

Specific Instructions

PART I—Identification Data

Item 1 a or b. Organization/Status. Check the box which indicates the status of the organization to which this form applies.

Item 2. Type of Submission. Check box (d) labeled "Other" and insert "Construction Industry Report" in the space provided.

Item 3. Name, Address, and Chief Executive Officer

Name. If Item 1(a) is checked, enter the legal name of the parent. If Item 1(b) is checked, enter the legal name of the unconsolidated entity.

Address. Enter the address of the executive office.

Chief Executive Officer. Enter the name and title of the Chief Executive Officer.

Parent. If item 1(b) is checked, enter the legal name of the parent.

Item 4. Is This a Resubmission? Answer Item 4 "yes" if you are supplying additional information or are resubmitting a report. In either case, the form must be completed in its entirety.

Item 5. Ending Date of Most Recently Completed Fiscal Year. Enter the date of the last day of the most recently completed fiscal year of the entity. If the fiscal year ending date has changed, enter the word "change" and attach a letter explaining the change.

Item 6. Reporting Period Ending Date. Leave blank.

Item 7. Annual Sales or Revenue. Enter for the most recently completed fiscal year, the total of the annual sales or revenues (as defined in 6 CFR 150.452) of the parent and its consolidated and unconsolidated controlled firms.

PART II—Calculation of Base Period Profit Margin

This part must be completed each time the Form CLC-22 is prepared. If the firm received an order granting a request for an exception affecting its base period profit margin, it may use the provisions of such an order in calculating the base period profit margin in accordance with the instructions to this part. In such cases the firm must enclose a copy of the exception order and document its use and dollar effect.

The term "base period" means any one, at the option of the entity, of that entity's fiscal years ending after August 15, 1968, other than the fiscal year for which compliance is being measured. A fiscal year in which it is determined that the entity unlawfully exceeded its base period profit margin can be a base period fiscal year except that operating income for that year must be reduced by the amount of the dollar value of the excess profit margin.

If a Schedule R for the base period year has been submitted

to the IRS pursuant to Subpart H, a photographic reproduction of the Schedule R must be attached to the Form CLC-22 prepared as a construction industry report. If no Schedule R has been submitted, for purposes of Part II of this form, firms which file Form 10-K with the Securities and Exchange Commission (SEC) must attach to the first Form CLC-22 completed in accordance with these instructions, a copy of their Form 10-K for the base period year.

Firms which must file Form CLC-22, but do not file Form 10-K with the Securities and Exchange Commission must prepare and attach to the Form CLC-22, annual financial statements (prepared in conformity with the generally accepted accounting principles consistently applied) in conformity with definitions in the Securities and Exchange Commission Regulations S-X in lieu of Form 10-K as specified above.

In addition, such firms which do not file Form 10-K with the Securities and Exchange Commission but which have annual financial statements audited by independent public accountants must attach a copy of such audited statements in conformance with the requirement for submitting Form 10-K as outlined in the paragraph above. Such firms which do not have audited annual financial statements must attach a document explaining why such statements are not available.

Firms which do not file Form CLC-22 should prepare annual financial statements in accordance with generally accepted accounting principles consistently applied.

The entries made in Items 8 and 11 must be reconciled in an attached Schedule with the corresponding entries reported on a supporting Form 10-K or other financial statements required to be attached to the Form CLC-22 by these instructions.

If an entity's annual sales or revenues from other than construction operations are not more than 50 percent of its total annual sales or revenues and the firm cannot separate its construction and nonconstruction operating income, the firm shall treat its nonconstruction operations as part of its construction operations in computing "net sales from construction operations" and "operating income from construction operations."

"Net sales from construction operations" means sales or revenues as defined in Securities and Exchange Commission Regulation S-X, from construction operations including the pro rata share of sales or revenues derived from the construction operations of any joint venture of which it is a participant but excluding foreign operations as referred to in the definition of annual sales or revenues in 6 CFR 150.452.

"Operating income from construction operations" means "net sales from construction operations" less "allowable costs" including operating costs and expenses; selling, general and administrative expenses; provision for doubtful accounts and notes; interest expense and other general expenses defined in Securities and Exchange Commission Regulations S-X when directly related to construction operations.

Allowable Costs

The following costs and expenses must not be included in the computation of operating income from construction operations:

- (1) Labor costs in excess of any wage or salary adjustment approved by CISC or CLC;
- (2) Labor costs incurred during the period from 9 p.m., e.s.t., June 13, 1973, through 11:59 p.m., e.s.t., August 12, 1973, as a result of the wage or salary adjustment described in (1) unless the effective date of the adjustment was prior to June 13, 1973;
- (3) nonoperating income items;
- (4) extraordinary items; and
- (5) taxes on income.

Item 8. Base Year 1 Net Sales. Enter the "net sales from construction operations" for the base period year.
Item 9. Base Year 2 Net Sales. Leave blank.
Item 10. Total. Enter the amount in Item 8.
Item 11. Base Year 1 Operating Income. Enter the "operating income from construction operations" for the base period year.
Item 12. Base Year 2 Operating Income. Leave blank.
Item 13. Total. Enter the amount in Item 11.
Item 14. Base Period Profit Margin. The base period profit margin is calculated by dividing Item 13 by Item 10.

PART III—Calculation of Profit Variation

This part must be completed by the entity each time Form CLC-22 is prepared as an annual report. If a Schedule R for the most recently completed fiscal year has been submitted to the IRS pursuant to Subpart H, a photographic reproduction of the Schedule R must be attached to the Form CLC-22 prepared as a construction industry report. If no Schedule R has been submitted, for purposes of Part III of this form, firms which file Form 10-K with the SEC must attach a copy of any Form 10-K for the annual period which ends on the date entered in Item 5, Part I. Firms which do not file Form 10-K with the SEC must file annual financial statements for the annual period being reported as required for Part II above. The entries made in Items 15 and 18 must be reconciled in an attached Schedule with the corresponding entries reported on the supporting Form 10-K or other financial statements required. If the entry in Item 19 shows that the profit margin of the entity for the most recently completed year is over the Target Profit, the entity must attach an explanation as to why it should not be considered to be in violation of 6 CFR 150.455.

Item 15. Net Sales. Enter the "net sales from construction operations" for the annual period being reported.
Item 16. Base Period Profit Margin. Enter the base period profit margin from Part II, Item 14.
Item 17. Target Cumulative Period Profit Margin. Enter the target amount of cumulative period profit determined by multiplying Item 15 by Item 16.
Item 18. Actual Operating Income. Enter the "operating income from construction operations" for the annual period being reported.
Item 19. Cumulative Profit Under (Over) Target Profit. This entry is determined by subtracting Item 18 from Item 17.

PART IV—Additional Information—

Self explanatory.

PART V—Certification

Type the name and title of the individual who has signed the certification and the date of signing. The individual who signs and certifies this Form CLC-22 must be the Chief Executive Officer of the Parent or such other executive officer of the entity as authorized by the Chief Executive Officer to sign for him for this

purpose. Such authorization in the following format must be received by the appropriate IRS office as indicated in the table at the end of the Form CLC-22 instructions.

Delegation of Authority To Sign and Certify

(Typed date of signing)

(Name of Parent)

(Name)

hereby certify that I am the

(Title)

of the above-named parent; and that, as such, I am authorized to sign documents and to certify, on behalf of said parent, to accuracy and completeness of all the information in such documents. Pursuant to the power vested in me, I hereby delegate all or, to the extent indicated below, a portion of that authority to the person(s) listed below, who is (are) executive officer(s) of the above-named parent or entity of the firm. This delegation is effective until it is revoked in writing, and the Internal Revenue Service is so notified.

(Date)

(Signature)

Authorized Individuals

Name and Title	Extent of Authorization
(Alphabetical by Surname)	

PART VI—Price/Cost Information

Leave blank.

Form CLC-22
August 1973
Replaces Form CLC-2,
For Fiscal Periods
Ending After
August 11, 1973

Economic Stabilization Program

PRENOTIFICATION, REPORT, OR RECORD OF PRICES, COSTS, AND PROFITS

OMB NUMBER 172-R0007

Approval Expires April 1974

Identification Number

Parent

Unconsolidated Entity

Part I—Identification Data

Internal Use Only

1. Form applies to:

- (a) ☐ Parent and consolidated entities
(b) ☐ Unconsolidated entity

2. Type of submission:

- (a) ☐ Prenotification (b) ☐ Quarterly Report (c) ☐ Certification
(d) ☐ Other _____

3. (a) Name of parent or unconsolidated entity to which this form applies

(b) Address (number and street)

(c) City or town, State and ZIP code

(d) Name of chief executive officer

(e) Name of parent (if item 1(b) is checked)

4. Is this a resubmission?

☐ Yes ☐ No

month day year

5. Ending date of most recently completed fiscal year

6. Reporting period ending date

7. Annual sales or revenues (to be completed by parent only)

\$ 000

Part II—Calculation of Base Period Profit Margin (For dollar amounts omit 000; show percentages to two decimal places.)

8. Base year 1 net sales (from Schedule R)—fiscal year ended

month day year \$

9. Base year 2 net sales (from Schedule R)—fiscal year ended

month day year \$

10. Total (add items 8 and 9)

\$

11. Base year 1 operating income (from Schedule R)

\$

12. Base year 2 operating income (from Schedule R)

\$

13. Total (add items 11 and 12)

\$

14. Base period profit margin (divide item 13 by item 10)

%

Part III—Calculation of Profit Variation (For dollar amounts, omit 000; show percentages to two decimal places.)

15. Net sales (from Schedule R)

\$

16. Base period profit margin (from item 14, Part II)

%

17. Target cumulative period profit (item 15 times item 16)

\$

18. Actual operating income (from Schedule R)

\$

19. Cumulative period profit under (over) target profit (subtract item 18 from item 17)

\$

Part IV—Additional Information

20. (a) Name and title of individual to be contacted for additional information

(b) Address (number and street)

(c) City or town, State and ZIP code

(d) Phone number (include area code)

21. You must maintain, for possible inspection and audit, a record of all price changes after November 13, 1971. Give location of such records.

Part V—Certification

I certify that the information submitted on and with this form is factually correct, complete and in accordance with Economic Stabilization Regulations (Title 6, Code of Federal Regulations) and instructions to Form CLC-22.

Type name and title of the Chief Executive Officer of parent, or other authorized Executive Officer, and date signed

Name

Date

Signature

Title

Part VI—Price/Cost Information

22. Name of parent or unconsolidated entity

23. Reporting period—month day year
From: to:

24. Product line or service line description (a)	4-digit SIC (b)	Sales (000 omitted) (c)	Weighted Average Per-centage Above (Below) Base Price		Cost Justifi-cation (f)	Maximum Price Increase (g)
			Prenotified (d)	Charged (e)		
(1)		\$	%	%	%	%
(2)						
(3)						
(4)						
(5)						
(6)						
(7)						
(8)						
(9)						
(10)						
(11)						
(12)						
(13)						
(14)						
(15)						
(16)						
(17)						
(18)						
(19)						
(20)						
(21)						
(22)						
(23)						
(24)						
(25)						
(26)						
(27)						
(28)						
(29)						
(30)						
(31)						
(32)						
(33)						
25. Total sales from continuation schedules		\$				
26. Total item 24, lines (1) through (33) & item 25		\$				
27. New products and services						
28. Wholesale/retail						
29. Public utilities						
30. Health services						
31. Insurance						
32. Construction operations						
33. Agricultural products						
34. Foreign operations						
35. Exports						
36. Custom products						
37. Lumber and related products						
38. Other						
39. Total		\$				

Express all percentages to the nearest two decimal places.

Cost of Living Council

2000 M Street, N.W.
Washington, D.C. 20508

CLC-22P Instructions
Additional Instructions for Petroleum and Petroleum Products
(As an addendum to Instructions for the Preparation of Form CLC-22)

These instructions are designed as an addendum to the Instructions for the Preparation of Form CLC-22 in order to provide for the prenotification of prices and periodic reporting of prices, costs, and profits pursuant to 6 CFR, Part 150, Subpart L. The Instructions for the Preparation of the Form CLC-22 remain unchanged except as altered by these instructions.

General Instructions

A. Purpose

(Same as the Instructions for the Preparation of Form CLC-22).

B. Who Must Use Form CLC-22

Replace paragraph 4 with the following paragraph and add paragraphs 5, 6, and 7.

4. **Certification of No Price Increase**—Any entity that would otherwise be required to file the Form CLC-22 on a quarterly basis which has not increased any price in excess of the greater of the base price (6 CFR, Part 150, Subpart F) or the adjusted freeze price (6 CFR, Part 150, Subpart E), and has not increased the price of a covered product in excess of its base price (6 CFR, Part 150, Subpart L), must submit within 30 days of the end of the entity's fiscal quarter, a Form CLC-22 with Parts I, IV, and V completed in accordance with these instructions, and, with the following certification typed in Part VI, Item 24, Lines (1) through (33):

I certify that as of (a), (b) has not at any time since (c); (1) charged a price in excess of the greater of the adjusted freeze price defined in accordance with 6 CFR, Part 150, Subpart E or the base price established in accordance with 6 CFR, Part 150, Subpart F; (2) charged a price for any custom product or service as defined in 6 CFR 150.104, or, if it has charged such a price, that the annual sales or revenues attributable to all its custom products or services will represent less than \$10 million and less than 1% of the entity's annual sales or revenues, (3) increased a price pursuant to the special rule for volatility in 6 CFR 150.156, or (4) charged a price in excess of the base price of a covered product as defined in 6 CFR, Part 150, Subpart L.

Chief Executive Officer (or other authorized executive officer)

The following information is entered in the appropriate blanks of the certification:

- (a) the reporting period ending date
 - (b) the name of the entity to which the Form CLC-22 applies
 - (c) the date of the last day in base price period.
5. Each "refiner"; and each "retailer", "reseller", or "producer" (of domestic crude petroleum as an operator) which derives \$50 million or more in annual sales or revenues from the sale of "covered products" as those terms are defined in 6 CFR 150.352, must prepare a Form CLC-22 as a quarterly report completed in accordance with these instructions.
6. Each firm which derives less than \$50 million but more than \$1 million in annual sales or revenues from the retailing or reselling of covered products must prepare and maintain at its principal place of business, a Form CLC-22 as a quarterly report completed in accordance with these instructions.
7. Each refiner subject to the prenotification requirements in 6 CFR 150.358 must prenotify price increases on a Form CLC-22 used as a prenotification document in accordance with these instructions.

C. When to Submit or Prepare

(Same as the Instructions for the Preparation of Form CLC-22)

D. What to Submit or Prepare

(Same as the Instructions for the Preparation of Form CLC-22)

E. Where to Submit

(Same as the Instructions for the Preparation of Form CLC-22)

F. Suggestions for Improvement

(Same as the Instructions for the Preparation of Form CLC-22)

G. Rounding

(Same as the Instructions for the Preparation of Form CLC-22)

H. Sanctions

(Same as the Instructions for the Preparation of Form CLC-22)

Specific Instructions

Parts I through V

(Same as the Instructions for the Preparation of Form CLC-22 except add the following paragraph to the Special Instructions for the Preparation of Form CLC-22 as a Prenotification Document)

3. Firms prenotifying a price increase pursuant to 6 CFR, Part 150, Subpart L, must use a separate Form CLC-22 to prenotify price increases on covered products as defined. For purposes of a Form CLC-22 used to prenotify price increases on covered products, the terms "base price" used in computing the entries in columns (d), (e), and (g) and "base cost" used in computing the entry in column (f) are as defined in 6 CFR 150.352 and 150.358 respectively. However, the adjusted freeze price may not be used in calculating the entry in column (g).

Part VI

(Same as the Instructions for the Preparation of Form CLC-22 except add the following paragraph)

For purposes of reporting price and cost data on

covered products as defined in 6 CFR, Part 150, Subpart L:

- (1) the base price for purposes of calculating the entries in columns (d), (e), and (g) is the base price as defined in 6 CFR, Part 150, Subpart L,
- (2) the base cost period for purposes of completing column (f) and the required Schedule C is the base cost period as defined in 6 CFR, Part 150, Subpart L,
- (3) the adjusted freeze price may not be used in calculating the entry in column (g),
- (4) price and cost data on covered products that the entity sells as a refiner are entered in Item 24,
- (5) only the data required for columns (a), (b), and (c) of Item 24 need be entered for the covered products that the entity sells as a producer, and
- (6) Sales of the entity from reselling and retailing activities are included in Item 28. If the entry in Item 28 includes sales of other than covered products a supporting schedule must be attached which provides the dollar amount of sales of covered products that is included in the entry in Item 28.

Schedule C
Form CLC-22
(August 1973)

Economic Stabilization Program

**CALCULATION OF COST JUSTIFICATION TO SUPPORT
NET PRICE INCREASES ON FORM CLC-22**

OMB NUMBER 172-R0007

APPROVAL EXPIRES APRIL 1974

Identification Number

Parent

Unconsolidated Entity

PART I—IDENTIFICATION DATA

Internal Use Only

1. (a) Name of parent or unconsolidated entity (as shown in item 3(a), Part I, Form CLC-22)	2. (a) Product or service line description From columns (a) and (b), Part VI, on corresponding Form CLC-22
(b) Address (street, city, State, and ZIP code)	(b) 4-digit SIC
	3. Reporting period ending date month day year

PART II—CALCULATION OF COST JUSTIFICATION

COST ELEMENTS (Attach supporting schedules as required by instructions)	Express all percentages to the nearest two decimal places							
	(a) METHOD USED		(b) Percentage Increase (Decrease) in Current Cost Level vs. Base Cost Level	(c) Percentage of Cost Element to Total SALES during Base Cost Period	(d) (b) x (c) Expressed as a Percentage			
	INPUT	OUTPUT						
4. Direct materials								
(e) Imported								
(b) Other								
5. Direct labor								
6. Other manufacturing or service costs								
(a) Labor								
(b) Other costs								
7. Other operating costs								
(a) Labor								
(b) Marketing, general and administrative								
(c) All other								
8. Nonallowable costs								
9. Profit								
10. Subtotal			100.00%	%				
11. Offset for productivity increase				%				
12. Weighted average percentage price increase justified by this schedule (Subtract item 11 from item 10)				%				
13. Base cost period	From:	month	day	year	To:	month	day	year
14. Current cost period	From:	month	day	year	To:	month	day	year

Schedule R
Form CLC-22
(August 1973)

Economic Stabilization Program

Reconciliation of Forms 10-K, 10-Q or Other
Financial Statements to Form CLC-22

OMB Number: 172-R0007

Approval expires April 1974

Identification numbers

Parent

Unconsolidated entity

Internal use only

1 Name of parent or unconsolidated entity

2 Period reconciled: ☐ (a) Base year ended
month day year

☐ (b) Cumulative period
month day year to month day year

	(a) Net Sales/Revenues	(b) Income
3 Net sales/revenues		
4 Net income		
5 Adjustments:		
(a) public utilities		
(b) foreign operations		
(c) insurance		
(d) construction operations		
(e) agricultural products		
(f) Total of Line 5		
6 Intercompany sales/income (Attributable to line 5(a) through (e) above)		
7 Restatements not previously included		
8 Equity interest in other entities		
9 Nonoperating items (list)		
(a)		
(b)		
(c)		
(d)		
(e)		
(f)		
(g)		
Total of line 9		
10 Income tax expense		
11 Extraordinary items (list)		
(a)		
(b)		
(c)		
Total of line 11		
12 Net sales (To Part II or III of Form CLC-22)		
13 Operating income (To Part II or III of Form CLC-22)		

Schedule T
Form CLC-22
August 1973

Economic Stabilization Program

REPORT OF RETAILING AND WHOLESALING MARKUPS OR GROSS MARGINS

OMB NUMBER 172-R0007

APPROVAL EXPIRES APRIL 1974

Identification Number

Parent

Unconsolidated Entity

Internal Use Only

1. (a) Name of parent or unconsolidated entity (as shown on part I line 3(a) Form CLC-22)

(b) Address (street, city, State, and ZIP code)

2. (a) Name of pricing entity

(b) Address (street, city, State, and ZIP code)

(c) Annual sales or revenues

\$ 000

3. (a) Reporting period ending: month day year

(b) Purpose of this Schedule:

☐ Quarterly Report for: ☐ Pricing Plan
☐ 1st ☐ 2nd ☐ 3rd ☐ 4th Quarter

(c) Is this a resubmission? ☐ Yes ☐ No

4 All percentages in Item 5 represent:

☐ Customary Initial Percentage Markups ☐ Gross Margins

(Check only one)

5. Schedule of Markups or Gross Margins

Merchandise or Customer Category	Pricing Base Period										Quarterly Reporting Period	Annual Period
	From:			to:								
	month	day	year	month	day	year						
(a)	(b) Year	(c) 1st Qtr		(d) 2nd Qtr		(e) 3rd Qtr		(f) 4th Qtr		(g)	(h)	
(1)	%		%		%		%		%	%	%	
(2)												
(3)												
(4)												
(5)												
(6)												
(7)												
(8)												
(9)												
(10)												
(11)												
(12)												
(13)												
(14)												
(15)												
(16)												
(17)												
(18)												
(19)												
(20)												
(21)												
(22)												
(23)												
(24)												

6. Individual to be contacted for additional information
(a) Name

(b) Title

(c) Address

(d) Telephone number (include area code)

STANDARD FORM NO. 83 OFFICE OF MANAGEMENT AND BUDGET 83-105		CLEARANCE REQUEST AND NOTICE OF ACTION (Under Federal Reports Act and Bureau of the Budget Circular No. A-40, as amended)		FOR O.M.B. USE <i>172-8007</i>
IMPORTANT - Submit the required number of copies of SF-83, together with the material for which approval is requested to: READ INSTRUCTIONS BEFORE COMPLETING FORM		CLEARANCE OFFICER OFFICE OF MANAGEMENT AND BUDGET WASHINGTON, D.C. 20503 <i>4100</i>		
PART A - REQUEST BY FEDERAL AGENCY FOR CLEARANCE *Items marked with asterisk may be omitted for preliminary plans or recordkeeping requirements				
1. SEND "NOTICE OF ACTION" TO: Name and mailing address James W. McLane, Deputy Director Cost of Living Council Washington, D.C. 20503		2. Bureau and division or office originating request Cost of Living Council Office of Price Monitoring		
		3. Name(s), title(s), and telephone numbers of person(s) who can best answer questions regarding request. Fred Laughlin 25-48690 <i>"on Sherrylligan"</i>		
FORM OR DOCUMENT IDENTIFICATION <i>6</i>	4. Title of form or document submitted See Addendum		*5. Agency Form Number(s) See Addendum	
	6. Type of form or document 1 ☐ Application 5 ☐ Preliminary plan or contract 2 ☒ Program evaluation 6 ☒ Recordkeeping requirement 3 ☐ Other management report 7 ☐ Other - Specify <i>7</i> 4 ☐ Statistical survey or report		7. Current (or former) O.M.B. clearance - Number None Expiration date N/A 8. Requested expiration date April 30, 1974	
	*10. Frequency of use 1 ☐ Single time 5 ☒ Quarterly 2 ☒ On occasion 6 ☐ Semi-annually 3 ☐ Weekly 7 ☐ Annually 4 ☐ Monthly 8 ☐ Other (See instructions)		9. Type of request 1 ☒ New 2 ☐ Revision 3 ☐ Extension (No change) 4 ☐ Reinstatement	
	11. Related forms or documents (Give O.M.B. number. Enclose in parentheses only to be replaced.) 172-2001, 172-672001, 172-60002		12. Catalog of Federal Domestic Assistance program number (if applicable) N/A	
COLLECTION AND RESPONDENTS <i>7</i>	*13a. Collection method (Check as many as apply) 1 ☒ Mail 2 ☐ Personal interview 3 ☐ Other - Describe <i>7</i>		14a. Type of respondents involved (Check predominant one) 1 ☐ Individuals or households 2 ☒ Business firms (non-farm) 3 ☐ Farms 4 ☐ Government agencies 5 ☐ Other - Describe <i>7</i>	
	*13b. Collected by - 4 ☒ Agency 5 ☐ Contractor 6 ☐ Other - Describe <i>7</i>		14b. Brief description of respondents (i.e., "households in 50 largest SMSA's; "retail grocery stores") Manufacturers & Service Organizations	
		15. Summary of estimated respondent burden		Number
		a. Estimated number of respondents		3300
		b. If sample, approximate number in universe		
		c. Reports filed annually by each respondent (item 10)		13
		d. Total annual responses (a X c)		53,200
		e. Estimated average number of man-hours required per response		2000
		f. Estimated TOTAL MAN-HOURS of respondent burden (d X e)		106,400,000
AUTHORITY AND CONFIDENTIALITY	*16a. Is report form - 1 ☐ Voluntary? 2 ☐ Required to obtain benefit?		3 ☒ Mandatory? Cite statute <i>5 U.S.C. 552</i>	
			*16b. Does your agency pledge confidentiality? 1 ☒ Yes 2 ☐ No	
CONSULTATIONS OUTSIDE AGENCY	17. In developing the report form or other documents, were consultations held with individuals or organizations outside your agency? 1 ☒ Yes - If "yes," identify persons and describe outcome in SUPPORTING STATEMENT. (See instructions) 2 ☐ No			
CERTIFICATION BY AUTHORIZED OFFICIALS SUBMITTING REQUEST - We certify that the form or other document submitted for approval is necessary for the proper performance of this agency's functions, that the information requested is not available from any other source, to the best of our knowledge, and that the request is consistent with applicable O.M.B. and agency policy directives. Signature and title of:				
Approving official for agency <i>James W. McLane</i>		Date 		Agency clearance officer or other agency official <i>Maryon Bell</i>
				Date <i>8/1/73</i>

STANDARD FORM NO. 63		OFFICE OF MANAGEMENT AND BUDGET								
CLEARANCE REQUEST AND NOTICE OF ACTION (Under Federal Reports Act and B.O.B. Circular No. A-40, as amended)										
PART B - NOTICE OF OFFICE OF MANAGEMENT AND BUDGET ACTION In accordance with provisions of the Federal Reports Act and Bureau of the Budget Circular A-40, as amended, the action indicated below has been taken with respect to your request for clearance of the report form or other document indicated in Part A on the reverse side.										
1. ☐ APPROVED. The information appearing in the box below must appear in the upper right-hand corner of the report form. O.M.B. No. _____ Approval Expires _____	3. ☐ APPROVED, under O.M.B. No. _____ The statement in the box below must appear prominently somewhere in the regulation, manual or other document: The reporting and/or recordkeeping requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.									
2. ☐ APPROVED, through <u>4-30-74</u> The information appearing in the box below must appear in the upper right-hand corner of the report form: Form Approved _____ O.M.B. No. <u>112-21007</u>	4. ☐ O.M.D. No. _____ PC Approval expires _____ This number is evidence of preliminary approval only. Specific data collection plans and report forms are subject to further review under Budget Circular A-40 before final approval action can be considered.									
NOTE: Please refer to Office of Management and Budget Approval Number in all future correspondence regarding this clearance.										
5. ☐ REVIEW SUSPENDED _____ _____										
6. ☐ DISAPPROVED, or other FINAL action, for the following reasons: _____ _____										
7. Remarks:										
8. ACTION APPROVED BY	Name (Signature) 	Title Clearance Officer	Date AUG 7 1973							
IMPORTANT - If your request for clearance has been APPROVED (i.e. boxes 1, 2, or 3 are checked), the following should be sent to O.M.B. on a post-clearance basis, as soon as available:		Two copies of the final PRINTED (or otherwise reproduced) report form, or reporting or recordkeeping requirement, transmittal letter, instructions, and any other document being sent to each respondent.								
FOR O.M.B. USE	1.	2.	3.	4.	5.	6.	7.	8.	9.	10.
	11.	12.	13.	14.	15.	16.	17.	18.	19.	20.

Mr. DUNKELBERGER. You can imagine what that would mean to a small food processor or a retailer or small manufacturer. For them it really does involve not the controller as in a large company, but the president and the top echelons of the company to process these forms.

Senator MATHIAS. Yes. You have to assume that those 2,000 hours are not all to be charged at the minimum wage standards.

Mr. DUNKELBERGER. I think that is fair to say. Many of them, of course, resort to outside accountant firms, which I might say are next to lawyers or equal to lawyers as far as benefits from the amount of business generated by the program.

Senator MATHIAS. In that connection, the National Association of Manufacturers (NAM) has published a survey of some of its mem-

bers, "The Impact of Controls," and I think we might put that in the record following Mr. Dunkelberger's testimony.¹

Mr. DUNKELBERGER. I think that would be quite interesting.

Senator MATHIAS. Do you have any questions? Counsel has one or two questions.

Mr. RODGERS. Mr. Dunkelberger, do you think it is an anomaly that in our legal system the rules and regulations in automobile accident cases, the rules and regulations which govern obligations and rights of parties in such circumstances, are more clearly spelled out than they are in this case?

Mr. DUNKELBERGER. There is just no doubt in the world that you are getting—there are so many other important segments of private activity that are regulated, in so much more detail than here. Of course, as to automobile accidents, the development of common law has contributed substantially to that, and we don't have the opportunity here for development of the common law, because we know this is only a temporary program—now in its 27th month. It is anomalous to my way of thinking that the most important area of regulation is the one that is least covered by detailed explanation of the requirements.

Mr. RODGERS. In that regard, when the Cost of Living Council reaches decisions, say, in a series of exception cases, what kind of information do they make available about the rationale for those decisions?

Mr. DUNKELBERGER. I haven't seen any. John, have you?

Mr. HODGES. Well, the order usually denying the exception on the original go-around will give a brief explanation of the criteria which allegedly were used in reaching the decision. One of the problems, however, is that the criteria which are used are criteria which the company did not realize existed when it originally applied for the exception.

Now, when the exception is turned down, there is an opportunity for the company to apply again for reconsideration of the exception, but the problem with the request for reconsideration is that the criteria which are used on reconsideration are only whether or not the original decision was in error in fact or in law.

So the chances for reversing the decision on reconsideration, despite the fact of having a meritorious case, is cut down substantially.

In light of these factors, I certainly hope that the Cost of Living Council and Internal Revenue Service would make available to the public the criteria which they have developed internally for decisions, both in the area of exceptions and for compliance.

Mr. Dunkelberger recounted during his testimony a situation in which a company was faced with a notice of probable violation and presented several arguments on its own behalf and was informed by the IRS that there was an "internal Q&A" that went the other way. It is simply unfair from the point of view of the regulated, to have decisions being made based on criteria which are not available either to the regulated or the public. I hope that can be remedied.

Senator MATHIAS. Are you saying that Secretary Shultz should keep his cottonpicking hands off the club in the closet?

Mr. DUNKELBERGER. That puts it very well.

¹ See p. 310.

One thing we might add concerning exceptions. If you look at it from the standpoint of where you are at any particular moment, the exception procedure is extremely important because there are a number of situations which cry out for some form of relief. It is my view, however, that a basic system of economic controls should not derive its fairness from an exceptions procedure. I am not a tax lawyer, but it is not my understanding that the Internal Revenue Code gives very general rules and then has administrative exceptions granted as a matter of grace. To my mind it is far better government to have more complex, more detailed rules, so that the exceptions procedure isn't necessary and the exceptions are really saved for the unusual situation that was not anticipated.

It is so easy to announce a general rule that is extremely onerous and to say, "Now, we will as a matter of grace decide whether to save your business' life or not." I don't think that is very good government, no matter how good the exceptions procedure is. On judicial review, if all the judges can look at is whether the Government should have provided an exception from its own rules, there is very little for the judge to get hold of. The exception procedure is important and you have to have it, but a far better approach is a much more detailed program and the bureaucracy that that necessarily entails.

Mr. RODGERS. Would you say, then, that really there are two steps that might be taken to help and that would be publication of guidelines and then some sort of system that published precedents on those occasions in which there is required interpretation?

Mr. DUNKELBERGER. I think that would be a reasonable substitute, Mr. Rodgers, for more detailed regulations. That is, if the exceptions were governed by criteria and guidelines that were spelled out, the company could then have a basis for deciding whether it was eligible for exception and someone reviewing that decision would have something to look at. I think that would be a reasonable substitute for more rules, but I really don't believe it is good practice to promulgate a strict general rule and to require firms to come in and ask for a favor if they want to do something that departs from that general standard.

Senator MATHIAS. We thank you both very much for very helpful testimony. I am sure that it will contribute very much to the results of these hearings.

Mr. DUNKELBERGER. Thank you. We very much appreciate the opportunity to come.

Senator MATHIAS. The next witness will be Prof. Ernest Gellhorn, University of Virginia, not only a distinguished member of the faculty of the university, but also the author of a number of books on administrative law.

I understand you do not have a prepared statement.

STATEMENT OF ERNEST GELLHORN, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA, ACCOMPANIED BY DAVID LARKIN, TERRANCE HARDERS, TIM SMITH, AND GORDON THOMPSON, LAW STUDENTS, UNIVERSITY OF VIRGINIA

Mr. GELLHORN. Mr. Chairman, I do not have a prepared statement. However, I am asking my students who assisted me in the preparation of my notes to come forward and to respond to your questions after I make a brief statement.

Senator MATHIAS. All right. I hope you introduce them for the record.

Mr. GELLHORN. I certainly will. I also would like to identify, Mr. Chairman, the names of some of the students who were not able to be here today because of other commitments, primarily classes.

Among the students who have helped me who are not here, first I would like to note Ms. Katherine Ott, second, Mr. Lee Unterman, and third, Mr. James Walsh, all of whom are second-year students at the University of Virginia Law School.

In addition, seated at the table with me today are Mr. David Larkin, a graduate student at the University of Virginia Law School, Mr. Gordon Thompson, a second-year law student at the University of Virginia Law School, and Mr. Terrence Harders; also, I believe, in the audience with me is Mr. Tim Smith.

Senator MATHIAS. Mr. Smith, if you would like to come up to the table, just pull up that chair. We don't make any rules about whether the chairs at the table have to have arms or not.

Mr. GELLHORN. We almost didn't make it here, Mr. Chairman, because on the way up we tried to buy some gas and the first gas station wouldn't sell us any, and we were a little concerned, but we did make it. However, I think this occurrence points out one of the serious problems and one of the reasons we are here.

Senator MATHIAS. Wouldn't sell you, or couldn't?

Mr. GELLHORN. I didn't inquire further. I was too concerned about getting gas, so I went on to the next station. I believe they could have sold gas to me because they were also selling other commodities, such as oil, windshield service, air and tires.

Though I don't have a prepared statement, I have some comments that I would like to make before I respond to questions; though, of course, I am happy to respond to questions at any time.

Initially, I would like to note some administrative law standards by which the administration of the wage-price control system might be measured. These are comfortable to me as an administrative law teacher and they govern most of our regulatory agencies.

First, of course, there is the dominant constitutional provision, the due process clause, which provides that no person may be deprived of life, liberty or property without due process of law. What this means generally is that there must be some regularized governmental machinery employed when Government acts or fails to act in a way so as to significantly affect a private person. The basic standard for trial type proceedings was set forth by the Supreme Court back in 1959 in the case of *Greene v. McElroy*: where governmental action seriously injures an individual and the reasonableness of the action depends on factfindings, the evidence to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Generally this constitutional standard has been fleshed out to mean that one has an opportunity to receive notice, to be heard, to have a decision made on a record, to have the reasons for that decision spelled out in the record and to have an opportunity for judicial review.

On the other hand, the constitutional command is a flexible one. Due process means that which is due in light of the circumstances and interests involved. The Constitution sets forth only a minimum

standard and the Congress has, via specific enabling legislation and the 1946 Administrative Procedure Act, spelled out additional requirements. One such requirement of particular note here is the provision that substantive rulemaking—the establishment of agency policy on substantive matters—shall be preceded by notice and an opportunity for public participation by written or oral submissions.

As administrative law has developed, it has expanded beyond a concern, however, for formal trial type proceedings or formal rule-making proceedings—technically, they are called “informal”; it now also seeks to cover informal administrative action. And to summarize a substantial amount of learning and law in the area, I would suggest that administrative law today seeks to focus on three specific areas or three interests. In identifying each, we seek to reach a balance; and it is by this standard that I would suggest my comments today measure the administration of the wage-price control system.

First is the question: Is the determination accurate? In other words, is the policy based on reliable facts to the extent facts are significant? Or, is the analysis correct?

Second, is the process fair and the results fair? For even if it is accurate, if it doesn't seem fair to the participants there will not be compliance or there will be frustration.

And third, since we don't have unlimited resources, of equally significant and sometimes overriding concern, is the process and the procedure efficient? Cost is really the ultimate question. Cost is involved in the constitutional issue, too, though that is often ignored.

So much for the basic legal standard. I now want to move quickly to an overview of the substantive policy, because I would suggest that the inadequacy of the substantive policy is the basis for most of the procedural problems which have occurred under the wage-price control system.

While I make no pretensions of being a professional economist, I think one who studies administrative procedure has to have some understanding of the economic system.

The wage-price control system is an attempt to respond to inflation (which is the relative increase in the price of goods—that is, a price increase without a quality increase).

Now, the usual corrective in a competitive economy is to allow prices to monitor consumer desires, allocate resources, and determine scarcity values. The difficulty is that when the Government increases the available supply of money as demand rises, there will be relative price increases without quality increases. And the wage-price control system is to some extent merely a throwing away of the thermometer. The demand is still present. Shortages will occur as a consequence. The basic underlying problem, in other words, is not treated by a wage-price control system. This, of course, accounts for the administration's suggestion—correct in my view—that the basic program must be a temporary one because it is not responsive to the underlying issues.

Perhaps in fact there is a better analogy than throwing away the thermometer because what occurs as I read it, or as I see it under the wage-price control system, is that we have a boiler (the economy) overheating, and instead of adjusting the boiler—for example, restraining the monetary supply and allowing, if necessary, unem-

ployment to occur with adjustments for those who are unemployed—we are shutting the vents, with the consequence that the room we are in may not be too uncomfortable, depending on where we are located, but other rooms may become terribly overheated, and every once in a while, of course, parts of the boiler explode and as a consequence has to be shut down for repairs.

What I am suggesting, in other words, is that a study focused solely on procedure without attempting also to explore the economic foundations of the wage-price control system will be inadequate. Procedure cannot reform faulty policy. It is, for example, my view, that any attempt to extend the wage-price control system beyond a very temporary freeze is inevitably doomed to fail unless we extend controls way beyond what we are willing to permit in a generally mixed system of Government control and private enterprise. I am not suggesting, of course, that Government cannot respond to inflation. I would suggest that it can. It can restrain its monetary policy, provide for alternative protection of those who are unemployed, and seek to make the economy more competitive, both in terms of business monopoly or oligopoly, and also in terms of labor monopoly problems.

A second aspect touched upon very effectively by the preceding witness is the temporary nature of the policy. We are now into our third year of a temporary policy. Frequently in administrative law we accept processes on a temporary basis which we would not approve on a permanent basis. We will ask people to make sacrifices, to accept inequities in an emergency, in crises, for short times. These same processes are no longer acceptable when the program is continuing.

We accept specific Government action to take contaminated food off the market, to replace reckless bank management, immediately, without necessarily providing all the procedural protections otherwise accorded. On the other hand, we do provide, then, an opportunity for those who have been displaced as bank managers, for those who have been the producers of food which is alleged to be contaminated, to contest that Government action and if it is erroneous to obtain relief. This has not been the case, however, under temporary wage-price control programs.

Now, to look to a few areas which appear to me to be specific areas of difficulty, some of which were also related by earlier witnesses. We have in the wage-price control system a series of rapid, almost constant changes in basic policy. To one who studies administrative procedure this means that those who are regulated are unlikely to be well informed about what the program expects of them. My students contacted the Richmond Advisory Service which provides information to the public, in general to those who are regulated in particular. They conceded that many of their calls came from law firms, whom I would expect normally to be able to look up and to determine how their clients ought to be responding. In fact, one of the respondents conceded that a significant portion of the calls which she received as a Government advisor responding to consumer questions was in connection with rent controls, even though the Cost of Living Council has not been regulating rents since, I believe, the onset of phase II.

A second problem resulting from rapid constant changes is that they often appear to be standardless. In fact, they seem to be responsive to political pressure. If one can find a large enough group who can

raise a loud enough political voice such as I would suggest occurred with the gasoline service station dealers recently, basic policy will be changed as to that group.

A third concern, of course, is fairness. Business relies to some extent on planning, on forward looking. Yet, today I would suggest that business is reeling from motion sickness. Flexibility is an acknowledged hallmark and a strength of the administrative process, especially in contrast to the judicial process. But like any sound principle, it can be abused so as to camouflage favoritism or ad hoc and inconsistent decisionmaking.

Another area of difficulty which my brief study of the wage-price control system suggests to me is its secretiveness and lack of regularized procedures. Since the preceding witness emphasized this point, I will not repeat his comments.

As an example, I would call your attention to the different procedures utilized by the Federal Trade Commission and the Cost of Living Council in requiring gasoline station pumps on the retail level to post the octane rating of the gas that they dispense. The Federal Trade Commission back in 1969 considered the requirement of posting octane ratings on gasoline pumps. Four years later that rule procedure is still in litigation. There has not yet been an opportunity to test it on the merits. And while that example is perhaps not perfect, because the case has been utilized as a test to measure the Federal Trade Commission's rulemaking powers, nevertheless, it illustrates the point. When the Trade Commission first announced its proposed rule, it held lengthy public hearings where the public had an opportunity to comment, to participate. It then revised its rule. It issued a lengthy statement of basis, and findings upon which it established the rule—58 pages in length.

The Cost of Living Council, in contrast, announced in July (I believe it was July 20), a proposed rule requiring gasoline service stations to post their octane ratings on their pumps. Whether or not they received comments I have not been able to determine. They may have received some but there was no public record made available. There was no lengthy statement of basis or purpose or objectives. And in September—I believe it was postponed until September 7 of this year—the CLC required the posting of octane ratings.

The result has been, I would suggest, a limited disaster—not a complete one but a limited one. In order to protect themselves against violations, gasoline service stations have been, if anything, understating the octane rating of the gas they dispense. For example, in an ad hoc random survey which I recently conducted in Charlottesville, Va., no service station selling gasoline listed the octane as being above 89 M.R., which is the technical term. Yet my 1971 car supposedly requires only regular gas, which according to the owner's manual, must use 91 octane. In chatting with a few service station attendants, they suggested that what customers were now doing was purchasing high-test—ethyl—in order to avoid damaging their cars' engines. Yet it seems that the regulation was designed to inform the consumer of the price he was paying for regular gas in order to avoid quality deterioration—which is usually the first response to price controls—and to allow him to make an informed decision so as to buy the lowest octane rating available consistent with his car's requirements. But,

as this account suggests, the actual result has been that consumers have been buying a higher octane rating and are paying more—and they are not particularly happy about it.

Another point I would make in connection with specific areas of difficulty has been the failure of the Cost of Living Council to develop standards—to explain and rationalize their program. This is undoubtedly in part due to its temporary nature, to its emergency and crisis atmosphere, and perhaps to the lack of an available sound rationale for wage-price control decisions.

Let me give you an example of how it operates according to what I read recently in the Wall Street Journal. INA Corp., announced an increase in its dividends on June 27, from an annual rate of \$1.50 to \$2.10 per share. That decision was based on a June 21 CLC press statement announcing liberalized dividend restrictions. After INA announced its dividend increase, the Cost of Living Council issued more detailed guidelines which required INA, under Cost of Living Council pressure, to reduce its dividends back to a \$1.91 rate, with, of course, consequent effects on the market price of INA's stock, effects on stockholders who purchased the stock, et cetera. It also resulted in the Cost of Living Council using what I would consider somewhat unseemly pressure to coerce the company to roll back their dividends. All of this is particularly disturbing because from a theoretical point, and as the Cost of Living Council has itself conceded, dividend policies are really unrelated to the arm of wage-price controls. Merely deciding, in other words, whether the money shall be retained in corporate hands or investors' hands seems to be unrelated to the pressures of monetary inflation.

Another area of difficulty has been the——

Senator MATHIAS. If I might interrupt you here, what you are saying is that in certain cases they are spotlighting for particular action, and I don't know whether you would like to comment at this point on the difference between the Cost of Living Council action in spotlighting specific cases and the action of prior years in jawboning a company out of—well, the steel industry, for one example, into either abandoning or rolling back price increases at various points in our economic process.

Mr. GELLHORN. Mr. Chairman, I would view them as problems on the same continuum. Guidelines are governmental action where an individual has no opportunity to complain but which, by the pressure of publicity and Government power, are effective in altering the wage and price decisions of individual firms or individuals operating in the economy. To one extent at least, the wage-price control system is more desirable because here Congress has specifically authorized the President to take action to stabilize wages and prices, and to the extent to which the orders follow this delegated authority, actions of the Cost of Living Council in either jawboning or in specific enforcement have been delegated to it by the Congress and are subject to some control.

So there is a relationship; yes. I would suggest very specifically that the entire wage-price control system goes back to some of the problems that occurred in the fifties and sixties. Jawboning first began, I believe, with the Economic Advisory Report in 1957.

Senator MATHIAS. Of course, it has the same erratic quality in picking out certain specific cases who are subjected if not to legal

restraints at least to whatever the force of public opinion can be mobilized by the Government, and it can, I think, have a very forceful effect. The concern, of course, is the erratic pattern with which it has been applied.

Mr. GELLHORN. There is one slight difference, and that is that under the wage-price control system, the enforcement-by-example process has generally been taken against the smaller company, the industrial company unable perhaps to respond as effectively on the public platform as the governmental agency, whereas in preceding years under jawboning it was generally focused on the large industries and the large unions who were somewhat better able to counter Government power. To that extent certainly the wage-price control system is an exacerbation. It makes it worse, not better.

Senator MATHIAS. Gentlemen, I have to leave for just a minute. If you complete your statement while I am out of the room, counsel will begin his questions.

Mr. GELLHORN. Thank you, very much.

Senator MATHIAS. I will be back.

Mr. GELLHORN. Turning to the information program and the difficulties which it has incurred, I think one can fairly state that the information service provided by the Cost of Living Council has been overworked and understaffed. This is, of course, in part responsive to the fact that the regulations are often spare and vague and unclear: when regulations are written, one often must conclude that they are more confusing than clarifying.

Let me give you an example. Phase IV exempts small businesses, firms with fewer than 60 employees, from wage controls. But if over half of the 60 employees belong to a union, or a labor group conducts their wage negotiations, that firm is not a small business, nor does the firm qualify for the small business exemption if over half the firm's revenue is from the construction field or from construction-related work. The regulations I am referring to specifically are section 150.60 issued by the Cost of Living Council in August of 1973.

The feeling which we got in terms of our brief investigation was that in asking the Cost of Living Council for advice, the response which the Advisory Service would offer was invariably "I will first have to get a copy of my regulations, et cetera." They seemed, in other words, to be prepared to respond to the questions of the last phase rather than the current phase.

Now, I would like to address three specific areas which have been previously focused on somewhat by earlier witnesses but upon which we did some specific investigation and upon which perhaps I can provide some illumination.

First is the question of enforcement and enforcement procedures utilized by the Cost of Living Council.

Second is the administration of the exemption and exceptions program.

And third is the utilization of publicity, that is, the use of adverse publicity as an enforcement sanction.

In connection with the enforcement program, I must first note that my views are merely impressionistic. I have not been able to take a sampling of enforcement techniques. I would, however, suggest this isn't because I have not tried. It was instead that the Cost of

Living Council is very reluctant and very slow to reveal enforcement information. They finally did provide some enforcement statistics on a vague and broad scale—such as the numbers of enforcement actions brought—but to find out specifics about cases, to find out the rationale for decisions, to find out the basis and criteria for the decisions, to obtain copies of written decisions, et cetera, proved virtually impossible. Despite repeated requests by me and my student assistants and despite repeated assurances by the Cost of Living Council that information would be available, we simply did not get it.

Because of this severe limitation on our data, I can offer only tentative conclusions in connection with the enforcement program. In general it seems to me it is not extraordinary. It relies primarily on voluntary compliance. That is not unusual. And perhaps it is highly desirable.

Second, there does appear to be inordinate reliance on publicity and some of these practices are not of the highest standard. As I noted in my earlier comments, the selection of smaller companies and, the use of them as examples seems unfortunate. In fact, it is frequently reported in the *Wall Street Journal* in connection with enforcement actions, that a company is being prosecuted as an example—suggesting that it was the Government itself which emphasized this point.

In talking to firms subject to Cost of Living Council controls, one certainly obtains the distinct feeling that compliance under phase IV has slipped, that rules are often so vague, so complex, or information so unavailable that firms are taking their chances with the expectation that at most a rollback or perhaps a refund will be required. Moreover, the note that to seek further information or clarification from the Cost of Living Council may invite the Cost of Living Council's attention.

Second, I want to note and perhaps speak more specifically on the area of exceptions. The administration of the exceptions program is worth examining because it is likely to be a stress point. The quality of its operation is likely to affect the entire administration of the Cost of Living Council's program. It was central to the circuit court's opinion, that is, Judge Leventhal's opinion, in *Amalgamated Meat Cutters* in upholding the constitutionality of phase I. In other words, the administration of the exception program underlines both the legality and the public approval of the wage-price control system.

Here Congress has been sparse in its commentary. Section 203(a) of the Economic Stabilization Act provides that wage-price control orders and regulations shall make such adjustments as may be necessary to prevent gross inequities. It later also provides the requirement that the standards be generally fair and equitable.

In fleshing out this requirement, the Cost of Living Council regulations are equally uniform. Section 155.41 merely repeats the statutory language and states that exceptions may be granted for the purpose of preventing or correcting a serious hardship or gross inequity. The regulations provide no more illumination except where exceptions are in fact granted.

Before looking at the actual granting of exceptions, one ought to compare the process by which an exception is obtained and the process by which an exemption is obtained. Not infrequently a regulated company is in the position to ask either for an exemption or an exception. If it is an exemption, the Cost of Living Council will refer to its regula-

tions and make an interpretation of its rules that it has written, or of the statute. There is, in other words, some room for argument, some room for negotiation, some room for interpretation.

Exceptions, on the other hand, are really nothing more than naked agency discretion to decide not to apply a control program, not because—if the program has some substance—it is necessary, but because the impact of applying the program would cause extreme hardship or some lesser standard if the agency so desires.

I have sought to study with some care the exceptions granted by the CLC that is, in terms of the information made available to me by the Cost of Living Council. The latest statistics they provided, however, are for exceptions granted between June 13 and August 7, 1973 (during phase III). In seeking to obtain the underlying data, unfortunately, my students were given the classical run-around. They were promised information. Information was sent. The information turned out to be inaccurate. The information generally was not responsive to what was specifically requested. It was a sobering eye opener for my students. Their view of the administrative process in operation, however, was not raised by this impression that they gained from bureaucracy in operation.

Specifically, I have a summary of the information obtained for this 7- or 8-week period. During this time, 1,254 exceptions were requested and all but 20 were decided by the Cost of Living Council. So we are operating with a grand total of 1,225 exceptions decided.

Of these, the Cost of Living Council denied 518, or 43 percent of those decided were denied. It did not grant the remainder however; only 109 of 1,225 or 9 percent were allowed. Most of the rest were other closures, primarily withdrawals, dismissals; these totaled 359, or 29 percent of the total. The remainder of 19 percent, that is, 240, were referred to other branches—Food, Drug, Health—and no further information was provided.

In light of earlier witness comments on the use of reconsiderations of exceptions, it is interesting to note that during this 7- or 8-week period, only 20 respondents requested reconsideration. Of these, four were granted, five were denied, and the others were closed—they were withdrawn, et cetera.

Mr. RODGERS. May I ask one question? You made reference to disposition of exception requests by the CLC. That does not include, I take it, disposition of exception requests by IRS in these key district offices, or did you ask for or receive a breakdown on that basis?

Mr. GELLHORN. Just a moment. I am going to have to ask the students—perhaps Mr. Thompson can answer that question directly.

Mr. THOMPSON. Mr. Rodgers, my understanding is that, as Mr. Gellhorn pointed out, the only information we were able to obtain as to the administration of the exceptions was for this period of June 13 through August 7, I believe. My understanding, as I said, is that the IRS was not empowered during that time period to handle exception requests. My reading of the phase IV regulations is that this phase was the first time that the IRS received power to consider the exception requests. It was part of a decentralization of the process, I believe, and our information didn't pertain to the period from the institution of phase IV.

Mr. RODGERS. I see. The reason I ask also is because, as I understand it, the first time information has been made available about which level within the total wage-price control system, both the Cost of Living Council and the IRS, should make the decision in a given case, is contained in the IRS manual which has just been released. I am curious to know whether the statistical breakdown of that—

Mr. THOMPSON. Well, under phase III, almost all the decisions were handled—exception request decisions were handled by CLC.

Mr. GELLHORN. A review of the press releases and other announcements made available by the Cost of Living Council in connection with exceptions—and in this area, I went back to as many records as I could find; in particular, I reviewed the Commerce Clearing House listings of the exceptions granted—really, reveals very little in the way of useful information. The granting of exceptions is not accompanied by opinions, findings, or what are generally called precedential terms. The CLC states only that the criteria for approval is that a firm incurs extreme financial hardship which apparently means something close to imminent bankruptcy, but not quite at the door, or suffers gross inequities.

The statements supporting grants of exception identify the firm, identify the standard industrial classification of census figures in which the product they produce or the service they offer is included, and they also note the most recent earnings of that firm.

On the basis of the skimpy record made available one might conjecture, and I want to emphasize the “might,” that the decisions are pretty much made on an ad hoc basis—but this surmise may be in error. On the other hand, I would suggest that it is the Cost of Living Council’s responsibility to establish that consistent decisionmaking has occurred; as yet, it simply has not provided any basis for that conclusion.

One thing does become apparent from looking at the various cases and statistics—and that has been true of each of the control phases—is that at the beginning of each phase the exceptions are granted grudgingly, if at all, but as the freeze wears on, more and more are granted, reflecting either greater hardship or greater confidence in allowing exceptions once the basic mandate of the program was established.

Now, there is another possible explanation, and that is, of course, that it takes a little time for influence to be felt. With so much at stake it would not seem unlikely that influence is a factor. On the other hand, I have no evidence to suggest that such opportunities have been made available.

Finally, I want to comment briefly on the use of adverse publicity by the Cost of Living Council. The use of adverse publicity as a sanction or a threat is, I suggest, particularly undesirable by the Cost of Living Council, because it is both unauthorized and it is beyond effective judicial protection.

In phase I it was used on occasion as I have outlined in an article in volume 86 in the Harvard Law Review at pages 1403 to 1406, the June 1973 issue. Publicity here was used to extend the control program beyond its then authorized scope, that is, to cover dividend policies, because as the President had first announced the Cost of Living Council’s wage control program and price control program, he did not cover

and include dividends. Nevertheless, shortly after phase I was adopted, the Cost of Living Council, by public press conference held apparently shortly before or shortly after particular companies were notified, announced dramatically that the dividend policies of six firms were inconsistent with the wage-price control program. It commanded the six companies to come to Washington to participate in a conference with then Secretary Connally and two other aides on the Cost of Living Council. Following a meeting with Secretary Connally it was announced that, in fact, two of the companies were not in violation of the suggested control program—an error had been made, though less prominence was given to that error than to the original announcement—and that three of the companies were going to comply.

The Secretary did, however, suggest that one company was holding out and that its actions were disheartening. Subsequently, however, they, too, responded to Government pressure.

The Cost of Living Council's use of publicity in phase I, as this illustrates, is perhaps explainable if not excusable on the ground that the agency was thrust into a crisis situation. As a consequence, it was asked to take on, develop, and oversee a program it really wasn't prepared to supervise, and it was expected to produce immediate results for a temporary program. Publicity is the easy, the quick, the cheap way out.

As the Cost of Living Council has continued in operation, its use of publicity appears now to be much more sophisticated, but still not always desirable. In February of 1972, for example, it asserted authority to issue adverse publicity by amending section 102.3(b) of its regulations; it authorized the CLC public affairs officer to release information about investigations of complaints to any individual with specific knowledge of a complaint. This language has subsequently been interpreted by the Cost of Living Council to include the press as long as they merely ask a question about an investigation of any company. (It seems, in other words, that the Vice President's recent complaint about publicity by enforcement agencies could be extended to the CLC.)

The Cost of Living Council currently appears to utilize publicity in three primary ways. This analysis follows a review primarily by my student assistants, but also by me, of Cost of Living Council press releases and reported news commentary from August 1972 through July 1973.

First, publicity will be issued in the form of a warning, usually by a telegram to an individual or firm primarily suspected as being an offender. This telegram is apparently publicized by the Cost of Living Council not infrequently before the individual is notified. The result is either a public denial by the affected respondent or a voluntary correction, and the "voluntary," of course, must be put in quotes.

This appears to me to be an undesirable sanction by press release to the extent to which the Cost of Living Council releases information prematurely. This process violates, I would suggest, basic tenets of notice and opportunity to be heard prior to the imposition of a sanction, as well as to notions of accuracy and fairness.

The second process is the CLC practice of announcing its investigations. Not infrequently the announcement of an investigation is accompanied by such language as Secretary Shultz used in the recent past

that it—the investigation—will undoubtedly find some violators and they will be clobbered pretty soon. Frequently no names are mentioned, but a small enough group is identified so that one has no difficulty in identifying the names. Sometimes names are mentioned, such as former Director Rumsfeld's identification of meat retailers in late 1972 who did not rollback food prices after wholesale prices had been lowered for a brief period of time. The result is specific and obvious. The affected companies usually comply with what Government officialdom requests. Whether this is fair or desirable, however, seems questionable.

The third area and the most frequent use of publicity today is that which attends specific enforcement proceedings. Publicity here is offered for its deterrent effect. Invariably it seems that smaller firms are selected for enforcement action. Some of this publicity involves formal (court) enforcement proceedings, but more often they are announcements of rollback orders or informal actions. I suppose where the administrative action is part of a settlement, the Cost of Living Council might argue that the publicity was agreed to as part of the negotiated result, and in lieu of other enforcement action. But I would suggest that this result could be questioned as a misuse of the Government's superior bargaining position.

In conclusion, then, it seems to me that what we have is sort of a reversal of Teddy Roosevelt's famous adage. A fair assessment, I would suggest, of the CLC's enforcement of the wage-price control program, and, I suppose, in particular of phase IV, might be described as speaking loudly and carrying at most a selective stick, one that spansks occasionally, sometimes lightly, sometimes harshly, but mainly at the small and the weak. I think this is particularly incongruous in light of the fact that the initiation of the control system was designed to get at the large, so-called monopolized sectors of the economy; yet the enforcement has been primarily at the smaller sectors of the economy.

Thank you.

Mr. RODGERS. Thank you. Mr. Gellhorn. I have only one question. Have you reached a conclusion with respect to whether or not the Cost of Living Council meets those standards and criteria for administrative process as you set out in the beginning of your statement?

Mr. GELLHORN. The reason I am pausing is that they have operated under frequent shifts of policy and under considerable stress with a very small staff. A fair assessment of how the individuals have operated in the circumstances would be, I think, that they have done an outstanding job individually, that the staff is as competent and as careful and as thoughtful as one could reasonably expect in the circumstances.

On a broader standard by which we measure the performance of government agencies under both constitutional standards and statutory norms, the result has been disappointing. Fairness has not been a hallmark. Accurate determinations after having received inputs from affected persons and the public, has not been a peculiar identification of the Cost of Living Council's operation. In fact, what we have seen are rather outstanding mistakes—thousands of baby chickens killed—because, I would suggest in part, there has not been adequate contact with the industry that was to be affected.

Regulation of fertilizer products in such a way that we are apparently going to have shortages at home because it is more profitable to

sell it elsewhere is another example. Here the price regulator has been taken off and a governor put on with the result that domestic prices have not been allowed to rise so that the farmers can purchase domestic fertilizer and prepare their crops. Contact with fertilizer producers might have avoided this costly mistake.

Currently, Government is responsive—eventually, but the lag time is such that the problems are not avoided. In fact, they are made worse. So we have not satisfied the three basic criteria, I would suggest, of accuracy, fairness, and efficiency.

Mr. RODGERS. Thank you very much.

Mr. PECORE. Professor Gellhorn, there appears here a listing of cases in the district courts arising from the economic stabilization statute as amended since the 1970 enactment. First of all, there are perhaps some 50 suits by the U.S. Government in which the Government has proceeded against businesses and individuals.

The second segment of the list is approximately 50 cases as of August of this year in which the Government has been sued under the economic stabilization program and statutes. There are some eight cases listed as private cases. I presume these are actions in which the individuals are seeking treble damages perhaps. I don't know. I haven't had a chance to review them.

Have your students had the opportunity to look at some of these cases, particularly those challenging the validity of the Cost of Living Council's actions?

Mr. GELLHORN. I don't believe they have, because I have looked at those myself.

Mr. PECORE. I see.

Mr. GELLHORN. But I didn't assign that to them because I kept that responsibility for myself, and I looked at the materials that are available in the reporting service, the Commerce Clearing House reporting service, which reports the basic allegation and subsequently the decision, but does not reprint the available record, and my request to the Cost of Living Council for underlying data was not supplied in time for these proceedings.

On the other hand, I made my request to the CLC in that connection fairly late, so I don't mean to be overly critical here. Nevertheless, I have read many of the cases—although I certainly have not read all of them. And I must also except most of the private cases since they are dismissals, that is, the court has usually said there is no private action for the particular complaint alleged.

Mr. PECORE. Would you attempt to advise us as to the effectiveness of the judicial review procedure which has been imposed in terms of correcting and providing some remedial device as to the actions of the Cost of Living Council?

Mr. GELLHORN. My response would have to be, of course, impressionistic. It evolved from reading the cases. Certainly looking at the opinions of the Temporary Emergency Court of Appeals, and especially the careful decisions written by its chief judge, Judge Tamm, you do get a feeling of the court's frustration that the record is inadequate, that the standards have not been developed, that more could be done on the one hand.

On the other hand, there is also a clear recognition as I read it that Congress has given a very broad mandate to the wage-price control agency and in fact there are frequent suggestions that it necessarily

had to in order to be flexible and responsive. The invariable result therefore has been to uphold the Government's decision.

There is, however, a suggestion contained in some of the opinions which I would suggest the Cost of Living Council could adopt, and which in fact Congress perhaps could pick up, and that is a suggestion that as guidelines and criteria are developed for deciding individual cases that the Agency should issue regulations to spell out the manner in which they are deciding issues. The Agency could do so and still recognize that the regulations cannot answer all cases; they can put sufficient constraints and caveats on their rules, saying that we think a particular rule would perhaps not apply in an area; still the rule could at least suggest how it might be decided or viewed in light of some of the previous cases. The CLC writes some regulations with examples in them. Here, of course, the prime precedent would be the Internal Revenue Code regulations which do contain specific examples.

There, of course, our experience is much broader and our opportunity for writing more explicit regulations is clear. There are, as I recall, urgent suggestions to the Cost of Living Council, and implied suggestions to the Congress, to mandate such a clarification of the decision process.

Mr. PECORE. Thank you very much, sir.

Mr. GELLHORN. Thank you.

Senator MATHIAS. Professor Gellhorn, we appreciate not only your being here, but the fact that you brought some of the students as backup. I would like to suggest that we could use your continuing assistance and we have—we would like to look upon your team here as a continuing resource of this committee. I would hope that you would be willing to help us as we get deeper into this problem.

Mr. GELLHORN. I would be happy to. I can't speak for my students since I asked them all if they would do this on a voluntary basis, but I would hope to.

Senator MATHIAS. I should perhaps tell you not in an effort to stimulate competition, but, as an old lawyer that I knew when I first went to the bar said, "No collusion, just cooperation," that Prof. William Hall at the University of Maryland has agreed to help us in a similar capacity, and I think that if we could work out some division of lines here it might be a useful project for you and for the students, and I know it would be of great value to the committee.

Mr. GELLHORN. We would be delighted.

Senator MATHIAS. Thank you very much.

The committee will now call Mr. Peter J. Petkas and Mark Silbergeld, who, I believe, will testify together.

STATEMENTS OF PETER J. PETKAS, ATTORNEY AT LAW, MEMBER, CORPORATE ACCOUNTABILITY RESEARCH GROUP, WASHINGTON, D.C., AND MARK SILBERGELD, ATTORNEY AT LAW, CONSUMERS UNION WASHINGTON OFFICE, WASHINGTON, D.C.

Senator MATHIAS. Gentlemen, do you have a prepared statement?

Mr. PETKAS. Yes, we do.

Senator MATHIAS. Since we are taking you as a team, perhaps you would like to submit the statements and they would appear in the record as if delivered and you can summarize them or make such other comments as you can.

Mr. PETKAS. Yes, we will.

[The prepared statements of Peter J. Petkas and Mark Silbergeld follow:]

PREPARED STATEMENT OF PETER J. PETKAS

ADMINISTRATIVE PROCEDURE OF THE WAGE-PRICE PROGRAM

Mr. Chairman, I am an attorney on the staff of the Corporate Accountability Research Group, an organization supported by Mr. Ralph Nader. I appreciate the opportunity you have provided us to express our views on the procedural aspects of the Nixon Administration's wage-price program.

We have had some dealings with the program in its several reincarnations since its inception. Most recently I testified at the Cost of Living Council's (CLC) hearings on auto price increases, August 27, 1973. Earlier we attempted—with little success—to persuade the Council to fully implement the so called Hathaway amendment to the Economic Stabilization Act. Mr. Nader succeeded in September 1972 in convincing the Price Commission to hold hearings on the 1972 round of auto price increases.

I am currently a plaintiff in two law suits against the CLC. One filed in April 1973 to compel them to obey the Federal Advisory Committee Act of 1973 and one, with Consumers Union and Senator Hathaway, filed in July, 1973 to compel the Council to properly implement the new Hathaway public disclosure amendments.

For most citizens, smaller businesses and consumer groups, we believe the Economic Stabilization Program has been and continues to be an administrative disaster. Aside from a few recent and essentially cosmetic gestures, the CLC and its predecessor agencies, have operated as if citizen access, public disclosure, procedural fairness, and Congressional oversight, rather than the economic forces they were created to control, are the principal enemies of effective economic stabilization.

Unfortunately, Congress has failed from the very beginning to significantly limit what must be the most unrestrained executive discretion ever granted in peace time. In our view the Economic Stabilization Act itself is a model of how *not* to delegate responsibility to the President. In its pell-mell rush to escape responsibility for economic affairs, the Congress in effect invited the Administration to be as arbitrary and unfair as political pressures rather than any requirement of law would permit.

I shall recount a few of our experiences and observations about the Economic Stabilization Program and then suggest several steps that Congress should take to make sure that this agency and the Phase V agency, if there is one, operate openly and fairly in the future.

PUBLIC HEARINGS

Section 207(c) of the Economic Stabilization Act, as amended in November 1971, requires formal public hearings "to the maximum extent possible" on price changes which may have "a significantly large impact" on the economy. Not until September 1972 did the Price Commission deign to hold hearings and then only after a suit had been filed to compel them. These first hearings—on auto prices—were largely a charade designed to create the appearance rather than the substance of public participation.

(1) The auto companies had already been told to resubmit their requests more than a month *after* the hearings, so there were no live requests upon which to comment. The Commission rejected demands from consumer groups that the hearings be postponed until the final requests were in.

(2) The Commission refused to release any relevant information about the requests, including data submitted by the companies to justify them, even though the confidentiality section of the act authorized the release of information "when relevant in any proceeding under the act." (Section 205(a)). The Commission even refused to release *aggregate* industry data in its possession.

My own recent experience at the auto price increase hearings in August suggests that the situation has deteriorated. Here are a few of my frustrations:

(1) The first public notice of the hearings appeared in some newspapers on Tuesday August 21st. The hearing date: Monday August 27th.

(2) The first official notice, spelling out the details of how one might participate, was published in the *Federal Register* of Wednesday August 22nd. Even in Washington the Register often arrives a day after its date and as many

as three days after its date in other parts of the country. Since the deadline for requesting an opportunity to participate was Thursday, August 23rd at 5 p.m.—the day after the notice appeared in the Register—many groups were not notified until *after* the deadline had passed!

(3) *Neither* the CLC's press release of August 20th, *nor* the notice in *Federal Register* revealed

- (a) the names of the companies seeking increases;
- (b) the names of the products involved;
- (c) the date the CLC had been prenotified of the increases;
- (d) the percentage increase involved; or
- (e) the dollar amount of costs asserted on justification of increases, by company or by product.

(4) Efforts to obtain this kind of information informally—efforts which would not even be possible for persons outside the Washington area—were not successful. I guessed at the names of the auto makers, but was never able to identify with certainty the steel companies whose proposed increases would be the subject of hearings later in the week of August 27th. (The list published in the *Wall Street Journal* differed from the list supplied the Joint Economic Committee and the CLC no longer publishes a daily list of actions taken and applications received).

Not until the morning of the hearings was any of this information available otherwise than by surmise or rumor. At that time a list of the companies and the amount of increase sought was published. In their prepared statements, made public that day, several of the companies provided somewhat more detailed information. Earlier, my secretary had been able to obtain from their Washington office the one or two paragraph press releases issued by three of the companies. American Motors, however, told us we could only get information at the hearing. The press releases we were able to obtain at least revealed the magnitude of the increases each had sought.

PUBLIC DISCLOSURE

The Hathaway amendment requires that certain portions of the reports filed with the CLC by very large enterprises be made public when those companies increase prices more than 1.5% on "substantial products" (i.e., those representing more than 5% of a company's sales). The CLC's response to this requirement reflects, I believe, the attitude of the agency toward Congress and toward public disclosure. It demonstrates the accuracy of *Fortune* magazine's (August, 1973) description of the program as "Professor Dunlop's Unseen War on Inflation."

On March 30, 1973 representatives of the CLC and several other agencies appeared at a public meeting of the Business Advisory Committee on Federal Reports (BACFR). More than 140 representatives of various large corporations and trade groups that make up or support the BACFR were present—as were seven CLC staffers, four OMB staffers, three FTC representatives, three congressional aides, and two members of the public. (The OMB receives advice from the BACFR as to how to carry out its functions under the Federal Reports Act). I shall submit a copy of the minutes of this meeting for the hearing record.

The meeting was called to discuss the CLC's proposed form "CLC-2," the "Report or Record of Prices, Costs, and Profits" for Phase III. At the same time, Congress had under consideration the Hathaway amendment. The CLC representatives responded to inquiries about confidentiality in this fashion (quoting from the minutes of the meeting, page 12):

"The CLC requested the help of business to define the confidentiality limits and were themselves predisposed to sustaining Phase II procedures into Phase III. They would leave the definition of proprietary information up to companies requesting confidential treatment of those data, recognizing however that Congress is presently trying to define the limits of confidentiality. . . . The CLC replied [to a further question] *that while they assumed the legislation would pass in some form, they still had the obligation to the corporations to keep some data confidential.*" (Emphasis added).

Thus, before the final form of the Hathaway amendment became law, the Council's policy was clear: *whatever* disclosure requirement Congress imposed, the CLC would see to it that not all information would be disclosed.

Indeed when the Hathaway amendment became law, the CLC effectively

guttled it by refusing to read it to require any substantial disclosure. The whole purpose of the Hathaway amendment was to equalize the public disclosure requirements between smaller single product companies and large multi-product companies. Since a single product company would automatically reveal very detailed information about its performance in its only line of business in its reports to the SEC, Senator Hathaway reasoned that large companies' reports to the CLC should be public at least to the extent that smaller companies make public disclosures through the SEC.

This was no mere academic desire to disclose for its own sake. It reflected a view often expressed by economists, investment analysts, and antitrust authorities that non-disclosure by conglomerate or multi-product enterprises causes severe dislocation of economic resources. It dampens competition by making it difficult for potential new entrants to challenge oligopolists with cheaper and better products. It causes investment dollars to flow toward corporations that can manipulate financial statements and juggle or mask the profits and losses of their various product lines.

Though Congress accepted this thesis, the CLC did not. It interpreted the Hathaway amendment to mean that unless precise identity exists between the information provided the SEC and the CLC, there should be no disclosure. Since the CLC requires "foreign operations," for example, to be excluded from its reports, no product line data supplied the CLC, other than percentage price increases, are required to be made public under current regulations.

When Phase IV was announced, the CLC decided to renumber its disclosure regulations. Since the Hathaway amendment refers specifically to certain regulations, Senator Hathaway and others feared the amendment was about to be administered its final *coup de grace*. Initial soundings at the CLC confirmed this fear. Senators Hathaway and Proxmire and others vigorously protested the impending triumph of form over substance. The CLC relented, but not without an ill-disguised slap at the proponents of disclosure.

The preamble to the final Phase IV disclosure regulations maintains in effect that the Hathaway amendment *probably* died with Phase III, but that in its wisdom the CLC had elected to continue the "policy" embodied in the amendment. I will submit the preamble and Phase IV disclosure regulations for the record.

As if this were not enough, the Council's administrative treatment of the reports that the Hathaway amendment generated carry the policy of secrecy one step further.

In my desperate search for some data upon which to base my comments at the August auto and steel price hearings, I checked to see if the eleven or so companies involved had filed public reports. None of the auto companies and only two of the steel companies (Jones & Laughlin and National) had done so. Perhaps they had had no price increases that would have triggered the disclosure requirement, but it is impossible to tell. The CLC leaves it to each firm to define the meaning of "substantial product." The staff of the Joint Economic Committee asked if the Council could check the non-public forms filed by these companies to see if price increases by these companies had, in fact, triggered the disclosure requirement. They were told that this would be impossible since the forms had been returned to the appropriate IRS district offices. At that point, I decided that form CLC-2 referred to by aficionados as Clic-2 should be renamed "Catch-22" and I gave up.

OTHER PROBLEM AREAS

Advisory Committees.—From the beginning the Economic Stabilization Program has operated through and with advisory committees. The Price Commission and Pay Board were themselves advisory in nature: most members served parttime, they were exempted from the conflict of interest laws and, as far as we were able to determine, policy decisions were made either by the respective chairmen or by the White House through the Cost of Living Council. With Phase III came a series of new advisory committees:

- Construction Industry Stabilization Committee
- Labor-Management Advisory Committee
- Food Industry Advisory Committee
- Tripartite Food Industry Wage and Salary Committee
- Health Industry Advisory Committee
- Tripartite Health Industry Wage and Salary Committee
- Ad Hoc Committee on Long Term Care

All of these committees and any others that may be formed are now subject to the new Federal Advisory Committee Act which generally requires open meetings, public notice of meetings (even if closed), and formal steps to be taken in order to create these committees. I shall submit for the record a copy of the complaint in our law suit against the Council for failure to obey the requirements of the act. Suffice it to say, that Director Dunlop's attitudes about public meetings are consistent with the Council's stance on public disclosure. When *Fortune* magazine asked him about our suit he said, "I'm dumbfounded that anybody would think I can get anything done that way."

Ex parte dealings. From the beginning of the program rumors have abounded about the manner in which regulated industries gain access to CLC decision-making. Washington attorneys, especially those representing smaller companies or industries, have told us "not for attribution" that personal contact with CLC staffers is essential in their practice. Formal petitions and even letters are rarely acknowledged and perhaps not considered.

The situation is somewhat different for the giants. We understand, and I suggest you inquire of the Council on this point, that the Phase IV oil regulations were drafted in collaboration with the American Petroleum Institute, Exxon, and, perhaps several other of the major companies. Though the independent companies were asked to present their views, a number of the major companies received drafts of the proposed regulations well before they were printed in the *Federal Register* for comment.

Secret Law. CLC decisions—with the notable exception of the lengthy justifications of the public disclosure regulations—are notably short and sweet. Typically an industry or company will approach the CLC staff before a request is made (that is, if it is large enough to support Washington counsel) and obtain a tentative decision or indication of the kind of compromise it might expect. The formal decisions that then issue simply do not reflect the considerations of the decision-makers. They are of little or no precedential value except to the company or industry involved (and to the handful of Washington lawyers and law firms who learn from experience or through informal contacts with CLC staff). And, of course, this brevity permits little or no analysis by either Congress or consumers.

RECOMMENDATIONS

1. Any future economic stabilization should be fully subject to the Administrative Procedure Act. If emergency conditions exist, the applicability of specific APA provisions could be suspended, but only to the extent that such a suspension was justified in detail and in writing and subject, therefore, to subsequent legislative and judicial review.

2. Any future program should include an adequately staffed and budgeted public advocates office. Its head must be independent, tenured, and responsible for the office's personnel and budget requests. The public advocate should be specially charged with bringing experts and citizens with dissenting views before the agency.

3. Public disclosure requirements should include quarterly reports of profits and sales by product lines, for the largest companies (e.g., those with more than \$100 million in sales). The agency should be left no discretion with respect to the disclosure of such information. As to any other information filed with the agency, assertions of the need for secrecy should be required to be supported by adequate on the record justification, subject to rebuttal by the public advocate, other agencies, and the public.

4. A detailed scheme of citizen remedies should be provided for consumers aggrieved by the action of the agency or the inaction of the public advocate. Consumers—individual and business—are real parties at interest in every price control decision and their procedural rights and remedies should reflect that fact.

5. All *ex parte* contacts and the substance of any discussions between agency staff and regulated industries or companies should become a matter of public record within a reasonable time after the contact is made.

6. All formal advisory mechanisms should be public in every sense: every meeting should be open and every committee should have consumer as well as producer interests represented in its membership.

PREPARED STATEMENT OF MARK SILBERGELD

Mr. Chairman, I am pleased to be here at your invitation to provide the Committee with such information as I can, regarding practices and procedures in the decision-making and enforcement process at the Cost of Living Council. Before I begin, I should provide a brief background on myself and the organization which I represent.

I am an attorney in the Washington Office of the Consumers Union of U.S., Inc., which is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information and counsel to consumers. Consumers Union's support comes from our more than 2.2 million subscribers and newsstand readers, and we accept no support from any commercial organization. *Consumer Reports*, the magazine published by Consumers Union, carries no advertising. Besides testing and reporting test results on products, *Consumer Reports* publishes general information for consumers on product safety, the economics of the marketplace, and the legislative, judicial, and regulatory actions of government affecting consumer welfare.

As an employee of Consumers Union primarily involved in the activities of federal administrative agencies which affect consumers, I have had substantial dealings with the Price Commission and the Cost of Living Council in the last year. I was briefly a member of the Price Commission's Retail Advisory Council during Phase II, as a consumer member of the Council under appointment from Chairman Grayson. On behalf of Consumers Union, I have petitioned the Cost of Living Council for formal rulemaking, testified before its price hearings on heating oil, requested it to require refunds for Phase II price violations, sought information from its formal records, participated in many informal meetings with Council officials and staff and, finally, I am co-counsel in our lawsuit against the Council, seeking to require that it conform its regulations governing public disclosure of information to the requirements of the Economic Stabilization Act.

The Cost of Living Council, so long as it is with us, is one of the most important agencies in the government, for it has the power to seriously affect—for better or for worse—the national economy and the consumer's pocketbook. It is highly desirable, therefore, that the procedures and processes utilized by the Council in reaching and enforcing its decisions be designed to formulate the best policies and programs possible. One aspect of this, and the aspect on which I should like to focus here today, is the access of the general public—the private citizen or citizen organization—to the decision-making processes of the Council.

Citizen access should work to enhance the operations of the Council in two directions. In one direction, citizens should contribute to the quality of the Council's performance by identifying both violations of Council regulations and areas where the Council should direct its attention. In the other direction, if this process is successful, meaningful citizen participation in the Council's processes should engender a degree of citizen confidence in the competence and good intentions of the Council, which could have a beneficial effect upon the consumer psychology which influences inflation.

Despite some commendable indications that there is citizen participation in Council programs, I have doubts that this process is working well in either direction, for the reasons which I shall discuss today. I should outline first, the major mechanisms by which the citizen or citizen organization can, at least, in form, reach the Council's decision-making and enforcement process:

1. petitions for rulemaking, under the provisions of the Administrative Procedures Act;
2. comments on proposed agency actions, when the Council solicits comments before decisions are made final;
3. written submissions and/or testimony at agency hearings, when the Council chooses to hold hearings before it takes action;
4. directing Council or Internal Revenue Service attention to price violations;
5. informal submission of suggestions to the agency through its Consumer Counsel or in meetings with other agency officials; and
6. membership on Council Advisory Committees.

I should like to comment briefly first, on two of these mechanisms which I will not deal with in any detail. *First*, the Office of Consumer Counsel has been extremely helpful in keeping consumers informed of every agency action in which public participation is invited, and in arranging for consumer access to policy-making officials of the Cost of Living Council. The Consumer Counsel has been invaluable, as well, in arranging for frequent briefings of consumer organization

members by Council staff with regard to Council procedures and substantive economic problems. *Second*, the Advisory Committees, composed primarily of industry representatives with a smaller number of public members, for the most part are—in my frank opinion—window dressing. I am unaware of economically significant Council actions resulting from a recommendation generated by an Advisory Committee.

INFORMATION VOID

The greatest problem the private citizen or organization has in utilizing the other routes of citizen access to the Council is the lack of information with which to question proposed or requested price increases or Council regulations. The data on which an individual company or an industry seeking a price increase bases its increase justification is treated as confidential. Nor does the Council make aggregate product line financial information available. The citizen who desires to question a proposed increase or regulation is left to gather such data as may be available from public sources. (The Federal Trade Commission has determined that such information is inadequate for the purpose of industrial analyses.) A witness who chooses to use such publicly available information is likely to be met with a rebuttal that the information is inaccurate, and have no means of evaluating this charge.

When I testified before the Council last February at its hearings on proposed home heating oil price increases, I concluded that the testimony elicited from industry and non-industry witnesses did not answer the questions which were relevant to the approval or denial of the requested increase, but merely indicated what questions should have been answered before an increase was granted. I submitted a long list of items of data and evidence which I recommended that the Council subpoena from corporate records. These were relevant to the causes and extent of the fuel shortage. The Council did not, at least publicly, develop any of this information. Instead, based upon confidential industry data, approved a 1.5% price increase.

A Board member of the National Consumers League, with specific expertise in the petroleum industry, later calculated from publicly available data that in order to hold the oil companies to the 1.5% limit over the base period defined in the ruling, the Council would have to roll back prices which had recently been in effect, rather than to permit additional price increases after the date the ruling was issued.

A group of consumers met with the Deputy Director, Mr. James McLane, and the Council oil expert, Charles Owens. When our conclusions based upon the Platt's Oilgram data were presented, we were assured that the figures from public data were unreliable, and that Council staff was satisfied from company data that the base price had not been exceeded by more than 1.5 percent. The company data were confidential, of course, but we were told that we could have the price data aggregated for the entire industry. The aggregated data has never been provided. Efforts to obtain it from the Council staff as recently as last week have been unsuccessful. We have been told by sources with contacts inside the Council that the Council staff most probably does not have the data.

INFORMATION BLANKET

When the Council does have the kinds of data on which pending or future price increases may be challenged, it does its best to protect that information from public disclosure, even in the face of a Congressional mandate to make the information available. The Congress, in the 1973 amendments to the Economic Stabilization Act, amended Section 205 of the Act to assure that certain corporate financial performance and price data be made public from quarterly reports filed with the Council with regard to those firms which increase their prices more than 1.5% over base. One result of such disclosures would be to give citizens greater information with which to question any future increases by such firms.

However, the Council, by adopting regulations under the 1973 amendment (the so-called "Hathaway" amendment) which are arbitrary, capricious and unfounded in the law, continues to keep essential data from private citizens and, thus to limit meaningful citizen participation in the Council's decision-making processes. Some of the information which the present regulations illegally protect from public disclosure include information which the Council itself makes available in its own press releases whenever price rollbacks are ordered. A copy of the amended complaint in the Court suit is offered for the record.

Senator Hathaway, Mr. Petkas (who is here with me as co-witness today) and Consumers Union have filed suit to strike down the Council's restrictive regulations and to obtain a Court order for regulations which will fulfill the Congressional mandate to make more information on price-increasing firms available for citizen use.

LACK OF RESPONSE

The lack of data is almost matched at the Council by its lack of response to citizen requests for action and for information which the Council concedes to be available. As I have already indicated, more than half a year has passed since one *ad hoc* consumer group was promised aggregate data on heating oil prices, and no data has been furnished. We have other, similar experiences as well.

Last year, Consumers Union, in our publication *Consumer Reports*, disclosed the frequently encountered practice of unlawful air fare overcharges by major airlines. These charges exceeded CAB tariffs and, since the Council had certified the CAB as the agency authorized to administer price regulations for airlines during Phase II, we believed the overcharges to be violations of Phase II price regulations as well. (The Council had generated great publicity over its Phase II suit to roll back the price of Testor's brand paint used on *model* airplanes, a product involving a fraction of the cost of the fare for a ticket on the real thing.)

However, our request to the Council to enforce the regulations by obtaining consumer refunds or price rollbacks in the face of a CAB refusal to do so, was denied by James B. Minor, then the Council's General Counsel. The reasoning he offered in his decision was not, in our opinion, well-founded; we appealed the decision to Dr. Dunlop on January 15, 1973, shortly after he was appointed as Council Director. No answer was received, not even an acknowledgment. On June 5, 1973, we inquired as to the status of our appeal to Dr. Dunlop and as to the status of a formal rulemaking petition for octane posting which we had also filed with the Council in January. No reply has yet been received.

The octane posting petition is another matter of lengthy delay and no acknowledgement. Our formal petition, asking the Council to promulgate a rule requiring the posting of octane number on gasoline pumps, was filed on January 26, 1973. No acknowledgement was ever received that the matter was under consideration, and no response was ever received to our June 5 inquiry as to the petition's status. When a rule for octane posting was included in the proposed and final petroleum industry rules for Phase IV, in August, we realized the first and only acknowledgement that any of our various attempts to participate in Council decision-making was receiving any consideration by Council staff or officials.

In another instance, our August 17 request, under the public disclosure provisions of the Hathaway Amendment, for data from quarterly reports filed August 15, has neither been acknowledged nor answered.

What is the effect of this *de facto* policy on the part of the Council? I think it is fair to state that I, as a professional consumer do not spend as much time participating in Council proceedings as I might if there were some indication that the recommendations which Consumers Union and other consumer organizations submit are receiving serious consideration. One might project, then, that consumers who are not paid to affect government decisions on a full-time basis, are even less likely to seek participation in the Council's decision-making processes.

My conclusion, then, is that without some decision to make relevant data available for citizen use—whether that decision comes from the Council or from the Congress—and without a determination at the Council to give serious attention to serious citizen input, both formal and informal routes of citizen access to the Council are only *pro forma*, and do not assure that interested citizens can affect Council decision-making.

Mr. PETKAS. Well, I will begin by summarizing my statement and then Mr. Silbergeld will summarize his.

Mr. name is Peter Petkas. I am an attorney with the Corporate Accountability Research Group, an organization sponsored by Ralph Nader.

Of course, we appreciate the opportunity of coming before you today and expressing some of our views and primarily some of the experiences that we have had with the economic stabilization program.

From its inception we have had some dealings with the Cost of Living Council, and its predecessor operating agencies. In numerous instances we have testified before other committees of Congress about various aspects of the program. I testified last August in the auto price hearings. Mr. Nader after some travail which involved filing a lawsuit was able to generate hearings in the auto price increase rounds in 1972.

I am currently a plaintiff in two lawsuits against the Cost of Living Council, one filed in April to compel them to obey the new Federal Advisory Committee Act, and one filed last July to attempt to compel them to enforce the so-called Hathaway amendment to the Economic Stabilization Act, the public disclosure amendment.

It is our firm belief that for most citizens, small businesses, and consumer groups, the economic stabilization program has been an administrative disaster. It is rare that a spokesman from the Nader organization and a spokesman from Covington and Burling agree on so many points, but I can second many of the points that Mr. Dunkelberger made. You can imagine that if Covington and Burling and his clients have difficulty understanding and participating in the program, what kind of difficulties consumer groups, both here in Washington and outside of Washington, have had. It becomes so frustrating at times that one simply wants to throw up one's hands and walk away from it, to treat it, the whole operation, as a consumer fraud at any rate, and forget about it, but, of course, we can't since it is a terribly important operation.

I will recount for you that part of my statement which deals with my recent experience in the auto price hearings which I think points up, at least in terms of the attitude of the Council, some of the serious problems that certainly ordinary citizens, or I should say the more sophisticated consumer groups, have had in dealing with the Council.

Those hearings were first noticed in public in newspapers on Tuesday, August 21, and they were scheduled for Monday, August 27, less than a week later. The first official notice appeared in the Federal Register on Wednesday, August 22, requiring anyone who wished to participate to file a request to participate by 5 p.m. of the following day.

Now, it is quite common in Washington to receive the Federal Register on the second day—on the day after its date. So even those of us in the consumer movement who read the Federal Register every day might have been faced with the situation of being notified of a public hearing about price increases in a terribly important industry with only a few hours to spare in order to get in our request. In fact, in many parts of the country the Federal Register arrives several days after the day of its date, so it is quite conceivable that a consumer group across the country would not be notified until after the deadline had passed.

Senator MATHIAS. If I could interrupt you at this moment, because I think it is important, other witnesses have mentioned the same difficulty. Was there any emergency quality to situations covered by these short notices which would give any warranty for lack of adequate time in which to respond?

Mr. PETKAS. Well, Mr. Dunkelberger pointed out that quite frequently when regulations have been promulgated without opportu-

nity for comment that the Cost of Living Council inserts a boiler plate phrase which notes that there is an emergency. It is difficult to believe that in this particular instance. Under phase IV rules, unless the Cost of Living Council acts within 30 days after prenotification, increases are permitted to go into effect if they are cost justified. And the Cost of Living Council retains power to delay an increase for a week or 10 days in order for it to make a decision.

So it was quite clear that they could, had they so desired, have given us at least another 4 or 5 days' notice for such hearings. At least that is our view. Their judgment was obviously different.

But the result of this short notice for us, and for the whole hearing process, was that the only people who really were able to prepare thorough and thoughtful and analytical testimony were the people from the industries who were requesting the increase, who obviously had been gearing up for this request for some time. At points along the way in preparing our presentation, we almost gave up. We almost called them up and said forget it. The notice is too short. Not only was the notice short, but the information provided by the Council was so bare as to make it next to impossible for us, without scurrying around Washington; for example, neither the notice in the Federal Register named the companies involved, named the products involved, gave the date of prenotification, so we would know how much time was available. They did not give the percentage increase involved, and they did not give the dollar amounts being asserted by the companies as cost justification for the increase. So we had to get on the phone, call Senate committees, call friendly staff members of the Cost of Living Council. We called all the companies involved to try and get copies of their press releases hoping that those would give us some information.

The point of it is that we must be very cautious about the current shift in the Cost of Living Council toward what is apparently a more open procedure if they don't also provide us full information and adequate time to make these public procedures meaningful.

At the recent soap industry price increase hearings, I got a desperate call from a staff member in the executive secretary's office on Friday before the Monday hearing. They were concerned that they had not gotten any consumer groups to testify. Our experiences and experiences of other consumer groups in previous hearings is such as to lead us to believe that it is really not worth the effort if you don't have the information and you don't have the time available to prepare.

The other significant problem that I have touched upon already with the whole operation of the Cost of Living Council is its almost fanatical commitment to secrecy at every level. The Hathaway amendments, which you may know about, require public disclosure by larger corporations of certain data which before had been undisclosed. The attitude of the Council toward those amendments has, in my view, been shocking in terms of the disrespect it has shown for Congress. There is certainly room for disagreement about interpreting the Hathaway amendments, but in our view, and that is why we filed the suit, the Cost of Living Council has gone so far beyond a reasonable interpretation of those amendments as to totally negate the purpose of Congress.

In fact, in a meeting before a business advisory committee to the OMB earlier this year, during the very moment the Hathaway amendments were being considered by Congress, representatives of the CLC indicated, quoting from the minutes of that meeting, that while they assumed the legislation would pass in some form, they still had the obligation to the corporations to keep some data confidential. In effect, they were saying, we don't really care what Congress does in terms of public disclosure. We make disclosure policy; Congress does not. And if you read the preamble to the final regulations that were promulgated to implement the Hathaway amendments—by the way, one of the most extensive explanations of any action that the CLC has ever made is that preamble to the Hathaway amendments regulations—you will find that they decided in effect that the Hathaway amendment requires no further disclosure but that in their wisdom they will adopt a policy of more disclosure.

Well, this kind of attitude, I think, reflects why I think Fortune magazine headlined a story on the Cost of Living Council "Dr. Dunlop's Unseen War Against Inflation," because the operation of the Council is virtually unseen.

The secret law that has developed—not only corporations don't know the basis for decisions, but citizens who would like perhaps to complain about such decisions are also denied the basis for decision.

The decisions are brief. Adequate justifications are not given. And it is a problem that makes public participation by a non-regulated group practically impossible.

Their advisory committees have, with some exceptions, been in our view in violation of the new Federal Advisory Committee Act, which requires open meetings except in certain circumstances.

Their dealings with the regulated, because of the situation that Mr. Dunkelberger described, have been necessarily informal and *ex parte*. Rumors abound. I have talked to attorney friends of mine who represent businesses—who don't want to be identified—about the difficulties that they have had, and about how the only way to get action on a particular problem or particular exception request, that, is to find the particular staff member at the Council who is going to be involved with the decision, making an appointment and talk to him and persuade him informally, off the record, that he should sign off on granting of an exception.

This is outrageous in terms of the interests of other industries and the public in playing a part, in being able to object to, or criticize, or to understand, if not to criticize, those kinds of decisions.

The most remarkable thing that I have learned is that in recent oil regulations that were promulgated by the CLC, drafts of those regulations were circulated among the major oil companies before they were published in the Federal Register, and that the first opportunity that the smaller companies had to comment on these was when they appeared in the public register for comments.

Now, even though they have moved, as Mr. Dunkelberger has said, in the direction of more regular proceedings, the attitude of the past, the attitude of acts by fiat and edict, seems to continue because the impropriety of circulating those regulations in advance to selected groups of the industry is obvious on its face. And the real solution—I have a list of recommendations in my prepared statement. I won't go

through every one of them, but in our view the real solution to these kinds of administrative abuses is specific language in the enabling legislation commanding that certain procedural safeguards be honored, and providing perhaps an exception process so the agency can exempt itself in emergency situations from the rigors of the administrative act. Generally Congress must take much more care in spelling out the obligations of any agency which has such an enormous amount of power over the economy.

It is an abdication that we can ill-afford, and, of course, 27 months of administrative chaos I think adequately support that observation.

I will let Mr. Silbergeld—

Mr. SILBERGELD. Senator, I will be as brief as possible in view of the hour.

I guess I will end up where Mr. Binsted began and that is with the specific experience regarding information about fuel.

As an attorney for Consumer's Union I have had a number of contacts with the Council from time to time, including the fact that we are co-plaintiffs in the Hathaway amendment case. One specific experience in which I took advantage of one route of citizen access to the Council was that I requested to be, and was placed on the witness list to testify last February at the Council's hearings on proposed price increases for home heating oil.

These hearings, as you may recall, were dominated by the question of what part, if any, the industry had in creating—or not anticipating, at least—a fuel shortage. As a matter of fact, the hearings were held before the increase was granted primarily because of questions to this effect raised by a number of Members of Congress.

When I testified, and when several other consumers on the witness list testified, we testified without the availability of any significant information. In effect what we told the Council was that we as consumers couldn't tell them what they should do because we didn't have enough information and we didn't think they had enough information. I took advantage of, and I will compliment the Council, a very interesting procedure in their hearings: They permitted at the end of all of the testimony witnesses who had previously testified, to testify again in brief rebuttal, summarizing and commenting on all of the testimony that had gone before. I was the only witness who took advantage of that and in rebuttal I submitted, I think, about an 11-page statement suggesting documents and data that the Council needed to obtain in order to even analyze the basic issues involved, in the question of whether they should grant an increase in view of this question of the causes of the petroleum shortage.

Well, the Council didn't do that, to our knowledge. They granted an increase using a guideline of 11½ percent and prices for home heating oil went up.

Shortly thereafter a group of consumers, including a director of one consumer organization, a gentleman who had had great experience with the oil industry as a staff member on Senator Hart's Committee on Anti-Trust and Monopoly, computed from publicly available data, "Platt's Oilgram," that if the Council wanted to invoke that 11½ percent guideline which we had reason to believe they granted without adequate information, they would have to roll back oil prices from the base date price, not permit further increase, because his computa-

tions indicated that they had gone already 11½ percent over the base date price.

A group of consumers requested a meeting with Dr. Dunlop: We got a meeting with Mr. McLain and Mr. Owens instead, to discuss this issue and see what the Council intended to do about it.

Here was a case of citizens bringing specific and fairly good economical analysis to the attention of the agency in the hopes the agency would take some specific action and have widespread effect on the economy.

We were told—we were assured—that the publicly available data from Platt's Oilgram was not sufficient to make this kind of judgment and that the information the staff had from corporate records was that the 11½ percent guideline had not been exceeded. When we asked if we could have the corporate information, we were told—of course, that was early in phase III, I believe, with no Hathaway amendment yet in effect—that this information was all confidential, regardless of the percentage by which any individual firm had raised its prices over base. We asked if we could have it in the aggregate, and we were told, yes, we could; the information would be developed.

That was in March, and this is October, and we haven't had it despite my attempt last week to find out again, after some other intermediate inquiries, as to where the data is.

Now, that is shocking enough and that brings me about as far as Mr. Binsted got, and that is that private citizens can't get the data.

Senator MATTHIAS. Let me interrupt you at that point to ask this question.

Do you think that they have the capacity to produce it or do you think they do not have adequate personnel?

Mr. SILBERGELD. I am going to go one step beyond Mr. Binsted. Senator, and that is that sources we have discussed the matter with who have contacts inside the Council tell us the reason we don't have that information is because the staff doesn't have it: That their assurances to us that our complaint, based upon public data, that prices should be rolled back, was not well founded. In fact, we are told that assurance was not well founded because the assurance that corporate records proved otherwise was not based upon an inspection of corporate records. Our impression is that the whole operation is seat of the pants and that——

Senator MATTHIAS. Just fumbling in the dark——

Mr. SILBERGELD. That's right, and that their information about the percentage—the actual prices, average prices charged for home heating oil, is no better than the information they tried to get Mr. Binsted's organization to collect from retailers.

I conclude——

Senator MATTHIAS. That would be a very shocking conclusion because when you consider the amount of—the degree in which the whole economy is hinged on that decision——

Mr. SILBERGELD. It is indeed. I conclude that citizens trying to use the various access routes to the decisionmaking process, and in my prepared statement I list six different ways in which that access is available to private citizens who are not subject to price regulations but who are instead the purchasers in the marketplace, who pay the prices that are authorized. I conclude that even those routes with whatever procedural safeguards may exist or may be added are

meaningless, unless there is some assurance that not only the Council but also citizens have access to the data which makes these decisions meaningful.

Mr. PETKAS. It has been our observation, too, that one of the reasons why we see all this apparent arbitrariness is not that there are a number of evil men down there on "M" street hatching these schemes, but because they really do not have time to pay any attention to such detail. I have had attorneys tell me that they have spent hours preparing petitions for exceptions, briefs, only to be told rather informally, but to be told nevertheless, that there was no chance that anyone on the Council would ever read the documents that were being filed because there is simply not time.

Well, of course, this reflects again Mr. Dunkelberger's opening comments, that from the very beginning the President has been committed to a bare-bones operation and, granted, in principle we ought to have efficient and lean and mean regulators, this philosophy in our view has now made it virtually impossible for the well-meaning people on the Council to provide for regularized decisionmaking, adequate public disclosure and adequate public participation.

Senator MATHIAS. In answer to the question I asked, Mr. Silbergeld, you would just say that there was simply not the capacity to respond?

Mr. SILBERGELD. I think that is quite possible. I don't know in this particular case, since from a practical standpoint that was the issue at the Council on which public attention was most focused, that what resources are there could not have been used to obtain some basic information.

For instance, a very simple source that I suggested, in that long list of data I wanted the Council to get before granting the 11½ percent increase, was the oil company reports to the Texas Railroad Commission, which are annual reports which show their reserves and anticipated production for the following year. To the best of my knowledge, that information was never obtained from the companies or the Railroad Commission. That certainly would not have taken much more than a very comparatively few man-hours of lawyers' time, especially if the attempt were to get it from the commission, rather than the companies, which might resist.

Senator MATHIAS. You say your experience was that when you attempted to supply this void, take to Dr. Dunlop information which might be helpful, that you really didn't have a very satisfactory result.

Mr. SILBERGELD. Well, as I say, that's right.

The result was we were assured that our information was wrong and the assurances were given on the basis of information we have reason to believe does not exist.

Senator MATHIAS. What about the question of confidentiality? Have either of you been faced with a claim of confidentiality?

Mr. SILBERGELD. Well, we were in that specific case. Rather than have them aggregate the industry's average prices and price increases, that is, prices for each of several dates for home heating fuel, we would rather have had it on a firm-by-firm basis, because that would have told us whether specific actions were appropriate as well as whether they should look into the whole industry picture. And we were assured at that point—and we were well aware at that point—

that under the law as it then existed they were entitled to keep that information confidential.

This is a bigger problem that applies not only to the CLC, but generally; the broader economic question which in turn have an effect on inflation. I told a House committee back in July that the Federal Trade Commission couldn't provide the committee with the information it wanted about the effect of competition on food prices because the commission doesn't have line of business data. A most interesting document in the files of CLC is the responses Ford Motor Co. filed to questions propounded by the Council staff following the September 1972 hearings which, as Peter Petkas mentioned, were held after Ralph Nader filed a lawsuit to force full hearings.

One of the questions propounded, and these were questions formulated by Mark Frederickson who at that time worked for Ralph Nader, was whether disclosure of industrywide profit figures on a product line basis—what effect disclosure would have upon competition. The Ford Motor Co.'s response was that they don't know what effect it would have if everybody in the industry knew what everybody else's top figures were, but that the best evidence that would have a bad effect is the fact that it has never been made available.

In effect, when you come to this very, very basic question of whether the public and the Congress have the right to know in order to determine what kind of controls should or should not be put on the economy, what kinds of basic economic policies we should have toward competition, what kind of information we should have about how competition actually works, we are faced with a public policy which says we aren't entitled to the information that tells us how well competition works and where it works and where it doesn't.

Mr. PETKAS. And, of course, that was one of the reasons why there was a Hathaway amendment.

Mr. SILBERGELD. That's right.

Mr. PETKAS. And in the process of administrative repeal that amendment is one of some concern for us. Recently Fortune magazine asked Director Dunlop what he thought about the suits that were being filed to open up the advisory committee meetings of the Cost of Living Council, and he told the Fortune magazine reporter, "I am dumfounded that anybody could think I could get anything done that way."

Well, that is the kind of attitude that we face even as to questions which are not—which don't go to the question of revealing trade secrets, getting the basis for decision; getting a guide to decisions; getting a list of enforcement actions; the difficulties that Professor Gellhorn's students have had.

The reason that they were not able to get that information is not because that information is secret by law or that the Cost of Living Council has a right to deny them that information, but it is simply because the operation assumes that something should be secret unless there is proven justification for disclosure.

Senator MATHIAS. The legislative branch suffers some of the same problems—

Mr. PETKAS. True.

Senator MATHIAS. In getting information.

Mr. PETKAS. The Joint Economic Committee has had some difficulty over the past 27 months with the Cost of Living Council. In fact,

during the time that I was attempting to prepare my testimony for the auto hearings, last August, I relied heavily on the Joint Economic Committee, and we found toward the end of the week that we were getting three different types of information. We were getting stories in the press about the kinds of increases that were being asked. The committee staff were being told by the Cost of Living Council congressional liaison staff different information, and I was getting different information when I called up the staff on the telephone.

So whether this is a reflection of a policy to harass those who wish information or a reflection of thin staffing in this area I am not sure, but in either case it is abominable in terms of the very important public interests that are involved.

Senator MATHIAS. Do you have a copy of the preamble to the Hathaway amendment regulations with you?

Mr. PETKAS. I am sorry. I do not have it with me.

Senator MATHIAS. That is all right. I think we ought to have it in the record, and I will direct it go into the record and ask staff to get it and supply it.¹

I did have one further specific question.

In the case of rents, if a landlord may wish to raise rents, what resources of the Cost of Living Council are available to him or to his tenants either to support or to protest the increase in rents?

Mr. PETKAS. Well, I haven't gotten into this at all myself. It is my understanding that there is no rent control now. But the first line of defense I suppose for the citizen is his local Internal Revenue Service.

Senator MATHIAS. In prior phases that was a regulation.

Mr. PETKAS. Right.

Senator MATHIAS. And I think we have to——

Mr. PETKAS. Look at the whole.

Senator MATHIAS. Look at the whole history.

Mr. PETKAS. I think what one would do—I haven't done it by myself and no one has brought such a case to my attention—is to go to the Internal Revenue Service. I have some feeling, and as a matter of fact I think the spokesman from the Retail Gas Dealers' noted this, some feeling that there is a great disparity between Internal Revenue Service operation in the economic stabilization area. There doesn't seem to be any consistency or the consistency seems to be more accidental than regular.

Senator MATHIAS. One of the reasons I bring up rents is because there are places in the country where there are local rent control ordinances or statutes and where there is a considerable body of experience in dealing with this problem.

Now, is there any effort to your knowledge to take advantage of that body of information?

Mr. PETKAS. Not to my knowledge. I must confess ignorance. I don't want my statement to be taken as the last word on that.

Senator MATHIAS. Gentlemen, we thank you very much for being here. You have contributed very much to the hearing from the consumers' point of view, and pointed out, I think, some of the inadequacies of the procedures that exist.

¹ Included as part of attachment No. 2 to the CLC's responses to questions from Senator Hathaway, *infra*, at p. 394.

I hope we can count on your continued interest and help as we work toward an improvement of the system, because while it is only temporary, temporary may last a while.

Mr. PETKAS. Mr. Chairman, I have some documents and memorandums which I would like to submit to the staff for their consideration, either to put into the record or simply to use, which I will present to you later in the week.

Senator MATHIAS. We will be glad to have it and we are going to keep the record open for a week or 10 days after the end of the hearings tomorrow, so if you will work with the staff on that we will admit them in the record as appropriate.

We will adjourn until 10 o'clock tomorrow morning.

[Whereupon, at 1 p.m., the subcommittee was adjourned to reconvene at 10 a.m., Wednesday, October 10, 1973.]

CONGRESSIONAL OVERSIGHT OF ADMINISTRATIVE AGENCIES

(Cost of Living Council)

WEDNESDAY, OCTOBER 10, 1973

U.S. SENATE.
SUBCOMMITTEE ON SEPARATION OF POWERS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:08 a.m., in room 6226, New Senate Office Building, Senator Charles McC. Mathias, Jr., presiding.

Present: Senator Mathias.

Also present: Walker F. Nolan, Jr., deputy chief counsel; J. L. Pecore, assistant counsel; Quincy Rodgers, minority counsel; and Telma P. Moore, executive assistant.

Senator MATHIAS. The committee will come to order.

Our first witness this morning will be William Walker, the General Counsel of the Cost of Living Council, whom we are very pleased to welcome this morning.

There have been from time to time some complaints about the operation of the Cost of Living Council, with which I am sure Mr. Walker is thoroughly familiar. But, on the other hand, I have heard some very high praise of the personnel of the Cost of Living Council who wrestle with very difficult problems. And much of that praise has been directed personally to Mr. Walker, and I know it is well deserved and lends added weight to the testimony he will give to the committee this morning.

STATEMENT OF WILLIAM N. WALKER, GENERAL COUNSEL, COST OF LIVING COUNCIL, ACCOMPANIED BY CHARLES EMLEY, ASSOCIATE DIRECTOR, OPERATIONS; ANDREW MUNROE, DEPUTY GENERAL COUNSEL; JEFFREY BERLIN, ASSOCIATE GENERAL COUNSEL FOR PAY MATTERS; MELVIN GOLDSTEIN, DIRECTOR OF EXCEPTIONS, OFFICE OF PRICE STABILIZATION; RICHARD GARVEY, DIRECTOR OF EXCEPTIONS, OFFICE OF HEALTH; ROBERT EVERS, DIRECTOR OF EXCEPTIONS, OFFICE OF FOOD

Mr. WALKER. Thank you, Mr. Chairman. I am pleased to be here with the subcommittee.

I might, in the beginning, say that I noticed in the morning papers the statement that you made, which was reprinted on the editorial page. I noted particularly the reference to Lewis Carroll and the Alice in

Wonderland image. And as a result, in the car on the way up here from the agency, I took along a copy of Bartlett's Quotations in an effort to find an appropriate riposte.

The only one I could find in hurriedly going through. This perhaps is not appropriate, but it might be amusing. Alice in Wonderland: "I'll be the judge and I'll be the jury, said cunning old Fury. I'll try the whole cause and condemn you to death."

Well, neither you nor we do business that way, but I thought that might be an appropriate way to start off the proceedings.

Senator MATTHIAS. Mr. Walker, I think the only response the committee might make at this point is that you said it. [General laughter.]

Mr. WALKER. I would like at the outset to introduce my colleagues. Seated with me on my left is Mr. Charles Emley, who is Associate Director of the Council for Operations. On my right is Mr. Andrew Munroe, who is Deputy General Counsel.

I also have with me, in the event that the subcommittee should get into detail on various areas, some other associates: Mr. Jeffrey Berlin, who is the associate general counsel for pay matters; Mr. Melvin Goldstein, who is the director of exceptions for the Office of Price Stabilization; Mr. Richard Garvey, who is the director of exceptions for the Office of Health; and Mr. Robert Evers, who is the director of exceptions for the Office of Food.

What I would propose to do, Mr. Chairman, is to summarize my opening remarks, reading portions of it and skipping over portions of it, so that we might spend the balance of time responding to questions.

Senator MATTHIAS. Your statement will appear in the record as if delivered in full.

Mr. WALKER. Thank you, sir.

[The prepared statement of William N. Walker follows:]

PREPARED STATEMENT OF WILLIAM N. WALKER

Mr. Chairman, I am pleased to have the opportunity to testify before your Subcommittee today. The subject of procedural fairness which, as I understand it, is the focus of the Subcommittee's inquiry, is important and a matter which the Cost of Living Council addresses everyday in virtually every facet of our operations. The exceptions process, in which the Subcommittee has expressed a particular interest, is but one of the points in the system where the Council interacts daily with the public in carrying out its regulatory responsibilities. Consequently, it is important, at the outset, for the Subcommittee to have in mind the broader context of the overall regulatory scheme: how the Council is organized, how it operates, what the division of responsibilities is between the Council and the Internal Revenue Service and how the Council interacts with the sectors of the economy which are subject to its regulations.

Before turning to that, however, there are a number of general points that should be made.

An obvious, but fundamental point is that a wage-price controls program, by its very nature, interferes with the operations of the marketplace. Indeed, it is explicitly designed to do so. It represents a decision by the Congress and the President to have the government intervene directly and significantly in the decision-making process of nearly every business in the land in order to serve the public policy objective of constraining inflation.

The direct effects of this process are familiar to all of us by now. Business may not increase prices except in compliance with Federal regulations, collective bargaining agreements are subject to scrutiny and change pursuant to Federal regulations, contracts must be rewritten to accord with Federal regulations, profits may not exceed limitations established in Federal regulations; the list goes on and on. The indirect effects of the process, though less visible, are no less significant. Federal regulations influence investment decisions, marketing

programs, judgments on allocation of company resources, acquisition and divestiture plans, sales strategies and a host of other factors.

These are among the reasons why the President has consistently and repeatedly made plain his determination ultimately to dismantle the controls program. As the President stated in his June 13, 1973 address to the Nation: "The Phase IV that follows the freeze will not be designed to get us permanently into a controlled economy. On the contrary, it will be designed as a better way to get us out of a controlled economy, to return as quickly as possible to the free market system." Those sentiments are entirely shared by Secretary Shultz, Director Dunlop and, I might add, the Council staff. Wage and price controls are, by definition, disruptive and uneven in their impact. Operating in an economy as diverse as ours they are bound to produce countless distortions and anomalies.

But you and we—the legislative branch and the executive branch—have together decided that we must have controls at the present time for supervening reasons of public policy. That decision is not without its costs, and among them are the inevitable hardships which controls necessarily impose upon individual companies, employees and labor organizations. Consequently, as the Subcommittee considers matters of fairness and equity in administering the program, it must bear in mind the fact that controls are deliberately designed to interfere directly with people's economic behavior and that dislocation, distortion and delay are inevitable results of that process.

Two other factors are of central importance. Controlling wages and prices in a trillion dollar economy is a herculean undertaking, but it is also of only temporary duration. Thus, analogy to other governmental regulatory efforts, affecting specific sectors of the economy and long-term in their duration, are of only limited usefulness as a basis for evaluating the Economic Stabilization Program. A controls program, unlike other regulatory efforts, places a premium on broadly applicable rules, flexibility in the system and prompt decision-making. Each of these elements places limits on the application of the more formal procedural standards which lawyers and scholars are more accustomed to dealing with. To see why, let us briefly examine each of them.

Rules. Regulating conduct across the entire economy requires very broad rules aimed at affecting the economic behavior of the largest number of firms possible. Inevitably, though, the impact of these rules will be uneven and different economic units will find themselves affected in different ways. This result is unavoidable and, given both the short duration of the program and the enormous administrative burden, anomalies cannot be avoided. Consequently, some economic units will inevitably feel that they carry a disproportionate share of the load.

Flexibility. The objective of the controls program is to constrain inflation. This requires an ability to adapt the program to changes in the economy. The short history of the Economic Stabilization Program provides a graphic illustration of this phenomenon. But the process of change disrupts the orderly development of precedent—both procedural and substantive—which normally characterizes administrative action and makes it difficult for the people being regulated to keep up with the changes. Moreover the variety of the problems which a controls program must deal with is almost infinite in a complex and dynamic economy like ours. The program must be sufficiently flexible—both procedurally and substantively—to deal with the varied array of problems it confronts. This, too, limits the customary development of administrative precedent.

Promptness. A controls program must be able to move fast. Decisions must be made promptly both to serve the policy objectives of the program and to meet the needs of the people being regulated. This constrains the use of elaborate procedural requirements and necessitates much more fluid, unstructured and informal operations than would be acceptable as part of a long-term regulatory effort. The procedures which govern most Federal regulatory agencies—and which result in protracted proceedings—are simply incompatible with a controls program.

The conclusion to be drawn from all this is that one of the necessary premises of a decision to implement a controls program is a recognition of the imperfections and shortcomings of the administrative process which must accompany it and an acceptance of the burdens that it will impose on the economy. Every effort should be made—and I can assure you is being made—to administer the program as efficiently, effectively and fairly as possible. The staff of the Council, and of the former Price Commission and Pay Board as well, has been extraordinarily energetic and dedicated to doing the best job possible. And we shall continue

to do so. But it is a big job, it has to be done fast and the traditional ground rules of administrative procedure necessarily have only limited application in such a process.

I would now like to turn to the structure of the Economic Stabilization Program in Phase IV and describe for the Subcommittee our organization, procedures and operating arrangements. My comments are directed to price stabilization policies, rather than to activities on the wage side, since this is where most of the recent attention has been focussed and, as I understand it, where the Subcommittee's principal interest lies.

PHASE IV OVERVIEW

We have made significant changes, both substantively and procedurally, from prior Phases and we had, in the forefront of our minds, as we deliberated—and as we continue to deliberate—our obligation to reconcile the competing imperatives of, on the one hand, getting the job done and, on the other hand, ensuring that the process for doing so is as fair and as open as possible.

It is an axiom of stabilization that simplicity and equity are mutually inconsistent. Equity presupposes a recognition of diverse circumstances which do not fit a simple rule, and accommodation of diversity necessitates rules that are more complicated. In Phase IV we opted for equity in that sense, and as a result our rules are somewhat more complicated than before. In particular, the program is far more sectoral in its approach than previous efforts. We have made a deliberate effort to accommodate the rules to the peculiarities of specific sectors of the economy in order to get at the specific inflationary problems of these sectors and to improve the workability of the rules as they apply in these different sectors.

The development of Phase IV rules was preceded by an extensive consultation process during which Council personnel met with over 400 individuals and groups to seek guidance on the design of the program. The regulations were published for comment in proposed form and the Council received nearly a thousand comments from members of the public. In addition, the Council staff personnel met with many interested groups and organizations during the comment period and received verbal advice, supplementing that which was submitted in written form. As a result of this public participation, the regulations were significantly altered when they were ultimately issued in their final form. I might add that the same notice and comment procedure is being used in connection with the Council's new executive compensation regulations.

Broadly stated, the basic price rules of Phase IV allow prices to increase over the levels prevailing during the last quarter of 1972 to reflect a dollar-for-dollar pass through of increased costs incurred since that time. A firm which increases its prices above base levels may not exceed its base period profit margin, which is defined as the average profit margin of the best two of the fiscal years ending after August 15, 1968, except the year for which compliance is being measured. Specialized rules are applicable in the insurance, health, and food sectors, although the basic principles are the same. Somewhat different rules apply in the construction and petroleum sectors. The retail and wholesale sectors are controlled, as they were in Phase II, on the basis of margin and markup constraints.

Firms are divided into three categories according to size, with the largest firms, those with \$100 million or more in annual sales and revenues, required to give the Council 30 days advance notice of proposed price increases. In response to a notice of proposed price increase, the Council may decide to hold hearings, or the Council may deny, modify, suspend, or defer a proposed price increase. A large portion of the Council's staff time is devoted to analyzing notices of proposed price increase, and the prenotification technique is one of the basic tools used in moderating price behavior.

Certain broad types of relief have been built into the basic pricing rules. A firm that has customarily priced an item in a manner immediately responsive to frequent and customary market price fluctuations of the raw materials or partially processed products which it uses in that item may apply to the Council to increase the price of that item to the extent of any market price increase of those raw materials or partially processed products without regard to the prenotification requirements. Such an authorization is known as volatile pricing authority.

Large firms which have operations totaling less than \$100 million in annual sales and revenues within a particular industrial group may apply to the Council for a waiver of prenotification with respect to those operations. The requirements for obtaining this relief are spelled out in the prenotification regulations.

Firms with low profit margins or with losses may qualify for treatment to raise prices without regard to the general price rules in order to achieve a minimum profit margin set forth in the regulations.

In addition, there is a regular interplay between firms subject to regulations and staff personnel of both the Cost of Living Council and the Internal Revenue Service. It has been standard operating procedure since the inception of the program for analysts to communicate directly with the companies involved and seek from them additional information, fuller explanations and generally to obtain as full an understanding of the problems involved as possible. Meetings are held with company officials and there is extensive telephone contact between the Council and the firms.

Aside from contacts which take place in the context of these more formal requirements, there is extensive informal contact between personnel of the program and firms subject to regulation. Innumerable telephone inquiries are received each week and the Council personnel respond to specific inquiries about the applicability and effects of particular regulations informally and expeditiously in this way. There are meetings with trade associations to deal with the problems of specific industries. The Council has an extensive schedule of public appearances where Council personnel address interested groups on general and specific subjects related to the program. In addition, questions are funnelled to the Council through Congressional offices as constituents contact their Congressman or Senator and request information which we are in turn asked to provide. Moreover, since early summer we have been meeting once or twice a week with members of the press who regularly cover our program to improve communications to members of the public through the media.

In short, the Council operates on the principles of easy access to members of the public. This premise is equally applicable to the Council's senior staff officials who spend very substantial portions of their time in meeting with individuals, companies and associations affected by the regulations. We are very sensitive to the need to communicate our programs and policies to those whom we are regulating and to respond to questions.

OPERATION OF THE PROGRAM

The basic operating principle which has been adopted for the Phase IV price stabilization program has been to delegate broad operating authority to the Internal Revenue Service to be exercised in a decentralized manner by key district offices. At the same time, the Council has retained authority to take action in certain areas, and, of course, the Council has the general responsibility to insure that the authority it has delegated is properly exercised. This system of decentralized authority is in marked contrast to the Phase II system under which most authority was concentrated in the Price Commission (with the exception of rent and certain Tier III matters) with the IRS acting primarily in an investigative and informational capacity. The aim of this Phase IV system is to speed up the decision making process and to provide for more ready contact between the decision makers and applicants.

The basic delegation of authority to the Internal Revenue Service is set forth in Council Order No. 37 (38 F.R. 21836, August 13, 1973). This basic delegation of authority is supplemented by a memorandum setting forth the working relationship between the IRS and the Council dated August 13, 1973, a copy of which has been furnished to the Committee.

Operating authority over all aspects of the price stabilization program has been placed in 29 key district offices, with key district directors exercising functional supervision over the stabilization activities of another 29 offices which perform primarily support functions. Key district offices are designated in IRS Delegation Order No. 140 (38 F.R. 22420, August 30, 1973). All filings, except in the area of health and insurance, are made with the appropriate key IRS district office. Insurance filings are made with the IRS national office, and all health filings are made with the Cost of Living Council.

IRS key district offices have authority to take actions on all filings subject to certain limitations established by the Council.

Prenotification

The Council has at the present time reserved authority to take action with respect to the following prenotifications:

- (1) Those involving a price increase of \$10 million or more;
- (2) Those involving a price increase of \$5 million or more which are also price increases of 5% or more;

(3) Those likely to have a substantial impact on the economy, e.g., ripple effect ;
 (4) Those which represent a departure from usual operating procedure due to an anomaly in an industry ;

(5) Those which present a special problem with respect to the Economic Stabilization Program regulations ; and

(6) Such other prenotified price increases as the Council may direct. The Director has provided that prenotifications for key industries are to be processed by the Council and a list of those key (sensitive) industries has been provided to the Committee.

Special Filings

Special filings, such as applications for modifications of prenotification requirements are processed by the IRS district offices. Applications for volatile pricing authority, are prescreened by the IRS district offices and forwarded to the Council for decision.

Exceptions

The IRS district offices presently have the authority to take action on exception requests except for the following cases :

(1) Class exception requests ;

(2) Exception applications involving key industries identified by the Council, or firms within the key industries identified by the Council ;

(3) Exception applications have precedential effect or presenting major policy issues ;

(4) Oil exceptions requests except those involving a retailer requesting a price adjustment of less than one cent per gallon ; and

(5) Requests making a *prima facie* case showing that denial may create serious regional/national supply problems or series regional employment or economic viability problems.

Health exception filings are also made directly with the Council and insurance filings are made with the National IRS office.

Civil Penalties

The IRS district offices have authority to compromise and collect civil penalties for violations of price stabilization regulations and orders by price Category III firms and for late filings of required price stabilization reports by price Category I and Price Category II firms. The Council has retained authority to compromise and collect civil penalties in all other cases.

Interpretations

The IRS district offices have authority to issue to individuals and individual firms written interpretations of the price regulations subject to the guidance of the Cost of Living Council.

Reconsiderations

(1) The IRS district offices have authority to take action on reconsiderations of prenotification decisions with respect to price increases of less than \$3 million.

(2) The IRS district offices have authority to take action on reconsideration requests relating to initial decisions taken by the IRS district offices on special filings, exceptions, remedial orders, and interpretations, except in such cases as the Director of the Council may otherwise direct. The Council has established an operating procedure under which the IRS key district offices forward copies of all reconsideration requests to the Council so that the Council can make a judgment as to whether to process the reconsideration request itself or to permit the IRS key district office to make the decision.

Training and Oversight

In any decentralized operational arrangement, there is bound to be some inconsistency and some unevenness in decision making. That is no less true here where the Internal Revenue Service conducts activities through 29 key district offices, each with significant operational authority. Consequently, the Council, together with the national office of the Internal Revenue Service, has undertaken a series of comprehensive efforts to insure consistency and efficiency of our efforts to the maximum extent possible.

Since the Internal Revenue Service has been involved in the Stabilization Program since its inception, it has a large number of personnel who are intimately familiar with the program in most of its facets. Nonetheless, even before Phase IV began, each regional IRS office conducted a two-day training session for IRS district office personnel. During the first two weeks of Phase IV, Cost of Living

Council analysts were detailed to 10 of the largest IRS district offices to provide technical assistance and further training. Six Council analysts were detailed to the Price Analysis Branch at the national office of the Internal Revenue Service for the first 30-days of the program for essentially the same purposes. During September, four regional conferences were held covering all 29 key district offices. These two day sessions involved personnel of the Council, the national office of IRS and IRS key district offices and were devoted to Phase IV price matters. In addition, the national office of IRS is conducting a series of training sessions in selected district offices on a continuing basis.

The national office of IRS has also undertaken a process of periodic audits of field activity. The so-called National Office Review Program involves an in depth review of substantive decisions and operational procedures. They are designed to assure a continuing review of the quality, timeliness and effectiveness of field activities. One such review has already been conducted in the North Atlantic region towards the end of September, another is scheduled for next week in the Southwest region and others are scheduled periodically for the balance of the calendar year and early into 1974.

In addition, the Council has established a communications center to which all IRS key district offices are linked by telephone and facsimile equipment to facilitate prompt exchange of information. Operating procedures governing the communications center call for 48 hour turn-around of all questions submitted to the center by IRS field personnel and, by and large, this schedule has been adhered to. The communications center represents the principle point of interface between the Council and the district offices, and through this network, there is regular and continuous communication between the Council and the field. In addition, each IRS district is connected to the central Cost of Living Council computer in Pittsburgh and elaborate instructions have been issued to each office for prompt posting of information into the computer which the Council can obtain on a prompt basis. A management information system has been developed based upon this computer arrangement which enables the Council to track and monitor filings, decisions and workload in the system.

EXCEPTIONS PROCESS AND PHASE IV

As I said at the outset, a necessity effect of a wage-price control program is to interfere with a person's normal way of doing business. Obviously, not every distortion merits treatment under the exception process and not every anomaly warrants relief. Otherwise the program would quickly dissipate. In the establishment of procedures and criteria for an exceptions process there is of necessity a tradeoff between the need to assure procedural fairness and to minimize the potential for bureaucratic abuse on the one hand, and the practical imperative to provide a prompt and efficient decision making process on the other hand.

Under the Economic Stabilization Act, the Congress has followed the precedent of the Defense Production Act and has excluded the Economic Stabilization Program from the requirements of the Administrative Procedure Act as they apply to adjudications in individual cases, except for the provisions of 5 U.S.C. 555(e) relating to notice of denial of a request and a statement of the grounds for a denial. The statutory requirements for procedures in individual adjudication cases are set forth in section 207(b) of the Economic Stabilization Act as follows:

"Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, rescission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearing where deemed advisable, for considering such requests for action under this section."

The Council's regulations governing procedures for obtaining an exception from the price regulations are set forth in Part 155 of Title 6 of the Code of Federal Regulations. Those regulations provide that firms are to make all filings for an exception, except in the case of health and insurance, with the key IRS District Office which serves the district in which their corporate headquarters are domiciled. All insurance filings are made with the national headquarters of the IRS and all health filings are made with the Cost of Living Council.

Initial action on an exception request may be made either at the IRS district level or by the Cost of Living Council.

Reconsideration requests are to be filed with the official issuing the initial decision. If the initial decision is issued by the Council, reconsideration action will be taken by the Council. If the initial decision is issued by IRS officials, the reconsideration might be handled either by the IRS district office or by the Council. The regulations provide for a hearing at the discretion of the Council or the IRS district office.

The Council has established a division of responsibility for deciding initial exceptions applications between the Council and IRS district and national offices which has been described earlier in my testimony. Until a body of precedent is established upon which the IRS districts may draw, *all* reconsideration requests from exceptions denials will be handled by the Council.

The Economic Stabilization Act provides some guidance as the criteria which are to be applied in administering individual exceptions to the regulations. Section 203(a) after setting out the general grant of authority to stabilize prices, rents, wages, salaries, interest rates and corporate dividends provides as follows. "Such orders and regulations shall provide for the making of such adjustments as may be necessary to prevent gross inequities, and shall be consistent with the standards issued pursuant to subsection (b)." Subsection (b) of section 203 describes the nature of the standards which must be issued to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, and corporate dividends. In specifying the nature of those standards, subsection (b) (2) speaks of making "such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits." However, this subsection speaks in terms of *general* exceptions and does not appear to govern the handling of exceptions in individual cases.

In its regulations, the Council has adopted the standards for exceptions in individual cases used by the Price Commission, "serious hardship" or "gross inequity." As a practical matter, the Council in Phase IV has broadened the scope of "gross inequity" to encompass the factors set out in subsection (b) (2) of section 203 of the Act. The material set out below with respect to "serious hardship" and "gross inequity" is drawn from the Phase IV handbook prepared for the use of the IRS which has been made available to the Subcommittee.

"Serious hardship" is a test which looks to the impact of the Economic Stabilization Program on the financial situation of a particular firm. In analyzing whether or not a serious hardship is present in a particular case, the Council or the IRS will examine the relevant factors on a firm-wide, entity-wide, or product line basis. The items which are taken into account in determining whether a serious hardship, gross inequity or market dislocation is present are set out in Chapter 6 of the Phase IV handbook and in the health training manual which the Subcommittee also has. As you will note, the process calls for a detailed and elaborate analysis of each request.

Several questions raised by the Subcommittee in correspondence with the Council relate to hearings on exceptions, how often they are held, how valuable they are, how often the recommendation of the hearing officer is followed by the Council or the IRS. In the practice of the Price Commission, hearings in the formal sense with a hearing officer were very rarely used during Phase II in connection with exception requests. It is contemplated that the same will be true in Phase IV in the price area. As a practical matter, the analyst charged with preparing a case will have extensive telephone contact with the applicant for an exception to secure data and to clarify matters in the submission. In instances where it has determined that an oral presentation will develop material that cannot be submitted in writing, the Council has permitted representatives of applicants to make such presentations and will continue to do so. Informality is the rule, and every effort is made to secure all information relevant to an exception application without unduly delaying the decision-making process.

PROCEDURES

At this point, I think it would be useful to outline for you the internal procedures which are used to handle an exception request. In instances where a decision is made at the IRS district level, the case is first evaluated by an analyst. Then it is reviewed by a senior reviewer in the technical branch of the district office. The case is further reviewed by the chief of the technical branch who signs the decision in most cases. The chief of the technical branch may refer a matter to the stabilization manager at the district level for decision.

Where decisions are made by the Council, the process is as follows.

General Industrial and Service

Exception requests in the general industrial and service sectors are analyzed by the Exceptions and Reconsiderations division of the Office of Price Stabilization. Following analysis and review by supervisors, the case is presented to a committee consisting of:

Director, Exceptions and Reconsiderations Division, Office of Price Stabilization—Chairman.

Representative of the General Counsel's Office, who at the outset has been the General Counsel or his Deputy.

Representative, Economic Planning and Analysis office, who at the outset has been the Associate Director for Economic Planning and Analysis or his Deputy. In oil cases, the Committee also includes the Director, Energy Policy Division of the Office of Price Stabilization.

Following review by the Committee, the case is presented to the Administrator, Office of Price Stabilization, for decision. The Administrator may consult with the Director or the Deputy Director, as appropriate, prior to making a decision.

Food

Following analysis and supervisory review a case is presented to a committee consisting of:

Director, Exceptions Division, Office of Food Monitoring—Chairman.

A representative of the Office of General Counsel.

A representative of the Office of Economic Planning and Analysis.

All exception cases following committee review are presented to the Administrator, Office of Food Monitoring for decision.

Health

After evaluation by an analyst and review by supervisors health exception requests are submitted to a review committee which consists of:

Director, Operation Division, Office of Health Monitoring—Chairman.

Representative, Health Policy Division, Office of Health Monitoring—

Representative of the Office of General Counsel.

Following review, the case is presented together with committee recommendation to the Director, Office of Health Monitoring for decision.

General

In all cases, if particularly difficult issues are raised, or if the review committee is unable to agree, the matter may be taken to the Council's Executive Committee, composed of the senior officials of the agency. Also, all class exception requests are presented to the Deputy Director of the Council for decision.

In addition, as the Subcommittee knows, the Council has appointed a committee of senior government officials to oversee exceptions policy developments by the Council. To date, this group has been involved principally in preliminary decisions about exemptions policy and in conducting the public hearings which the agency has held in connection with proposed price increases in various industries. It continues to be the Council's intention to involve them in the exceptions process and we will do so as reconsideration is sought of initial Council decisions. Thus, they will be involved at the appellate stage rather than at the first level of decision-making.

CONCLUSION

Like most endeavors, the administration of Phase IV could no doubt be improved. We are continually monitoring it and will no doubt make changes as the program goes along. However, we will also be interested in receiving the Subcommittee's views on the various subjects we have discussed and we look forward to your suggestions.

Mr. WALKER. The subject of procedural fairness which, as I understand it, is the focus of the subcommittee's inquiry, is important and a matter which the Cost of Living Council addresses every day in virtually every facet of our operations. The exceptions process, in which the subcommittee has expressed a particular interest, is but one of the points in the system where the Council interacts daily with the public in carrying out its regulatory responsibilities.

Consequently, it is important, at the outset, for the subcommittee to have in mind the broader context of the overall regulatory scheme: how the Council is organized, how it operates, what the division of responsibilities is between the Council and the Internal Revenue Service, and how the Council interacts with the sectors of the economy which are subject to its regulations.

Before turning to that, however, there are a number of general points that should be made.

An obvious, but fundamental, point is that a wage-price controls program, by its very nature, interferes with the operations of the marketplace. Indeed, it is explicitly designed to do so. It represents a decision by the Congress and the President to have the Government intervene directly and significantly in the decisionmaking process of nearly every business in the land in order to serve the public policy objective of constraining inflation.

The direct effects of this process are familiar to all of us by now. Businesses may not increase prices except in compliance with Federal regulations; collective-bargaining agreements are subject to scrutiny and change pursuant to Federal regulations; contracts must be written to accord with Federal regulations; profits may not exceed limitations established in Federal regulations; and the list goes on and on.

The indirect effects of the process, though less visible, are no less significant. Federal regulations influence investment decisions, marketing programs, judgments on allocation of company resources, acquisition and divestiture plans, sales strategies, and a host of other factors.

These are among the reasons why the President has consistently and repeatedly made plain his determination ultimately to dismantle the controls program. As the President stated in his June 13, 1973, address to the Nation: "The Phase IV that follows the freeze will not be designed to get us permanently into a controlled economy. On the contrary, it will be designed as a better way to get us out of a controlled economy, to return as quickly as possible to the free market system."

Those sentiments are entirely shared by Secretary Shultz, Director Dunlop, and, I might add, the Council staff. Wage-price controls are, by definition, disruptive and uneven in their impact. Operating in an economy as diverse as ours, they are bound to produce countless distortions and anomalies.

But you and we, the legislative branch and the executive branch, have together decided that we must have controls at the present time for supervening reasons of public policy. That decision is not without its costs, and among them are the inevitable hardships which controls necessarily impose upon individual companies, employees, and labor organizations. Consequently, as the subcommittee considers matters of fairness and equity in administering the program, it must bear in mind the fact that controls are deliberately designed to interfere directly with people's economic behavior and that dislocation, distortion, and delay are inevitable results of that process.

Two other factors are of central importance. Controlling wages and prices in a trillion dollar economy is a herculean undertaking, but it is also of only temporary duration. Thus, analogy to other gov-

ernmental regulatory efforts, affecting narrow sectors of the economy and long term in their duration, are of only limited usefulness as a basis for evaluating the economic stabilization program.

A controls program, unlike other regulatory efforts, places a premium on broadly applicable rules, flexibility in the system, and prompt decisionmaking. Each of these elements places limits on the application of the more formal procedural standards, which lawyers and scholars are accustomed to dealing with. To see why, let us briefly examine each of them.

RULES

Regulating conduct across the entire economy requires very broad rules aimed at affecting the economic behavior of the largest number of firms possible. Inevitably, though, the impact of these rules will be uneven and different economic units will find themselves affected in different ways. This result is unavoidable and, given both the short duration of the program and the enormous administrative burden, anomalies are certain to occur. Consequently, some economic units will inevitably feel that they carry a disproportionate share of the load.

FLEXIBILITY

The objective of the controls program is to constrain inflation. This requires an ability to adapt the program to changes in the economy. The short history of the economic stabilization program provides a graphic illustration of this phenomenon. But the process of change disrupts the orderly development of precedent, both procedural and substantive, which normally characterizes administrative action and makes it difficult for people being regulated to keep up with the changes.

Moreover, the variety of the problems which a controls program must deal with is almost infinite in a complex and dynamic economy like ours. The program must be sufficiently flexible, both procedurally and substantively, to deal with the varied array of problems it confronts. This, too, limits the customary development of administrative precedent.

PROMPTNESS

A controls program must be able to move fast. Decisions must be made promptly both to serve the policy objective of the program and to meet the needs of the people being regulated. This constrains the use of elaborate procedural requirements and necessitates much more fluid, unstructured, and informal operations than would be acceptable as part of a long-term regulatory effort. The procedures which govern most Federal regulatory agencies—and which, I might add, result in protracted proceedings—are simply incompatible with a controls program.

The conclusion to be drawn from all this is that one of the necessary premises of a decision to implement a controls program is a recognition of the imperfections and shortcomings of the administrative process which must accompany it and an acceptance of the burdens that it will impose upon the economy.

Every effort should be made—and I can assure you is being made—to administer the program as efficiently, effectively, and fairly as

possible. The staff of the Council, and of the former Price Commission and Pay Board which came before us, has been extraordinarily energetic and dedicated to doing the best job possible. And we shall continue to do so. But it is a big job, it has to be done fast, and the traditional ground rules of administrative procedure necessarily have only limited application in such a process.

I would now like to turn to the structure of the Stabilization Program in phase IV and describe for the subcommittee the organization and operations of the programs.

We have made significant changes, both substantively and procedurally, from prior phases.

It is an axiom of stabilization that simplicity and equity are mutually inconsistent. Equity presupposes a recognition of diverse circumstances which do not fit a simple rule, and accommodation of diversity necessitates rules that are more complicated. In phase IV we opted for equity in that sense, and as a result, our rules are somewhat more complicated than before.

In particular the program is far more sectoral in its approach than previous efforts. We have made a deliberate effort to accommodate the rules to the peculiarities of specific sectors of the economy in order to get at the specific inflationary problems of these sectors and to improve the workability of the rules as they apply in these different sectors.

The development of phase IV rules was preceded by an extensive consultation process during which Council personnel met with hundreds of groups and received written advice, formal advice, and received many comments and proposals, and we received thousands of comments, innumerable verbal comments. We met with affected groups, individuals, organizations, representing all sectors of the economy, in order to seek as much wisdom, guidance and advice as possible.

Now, I have set out in the next several pages some of the substantive—in a very summary form—characteristics of the program. And let me briefly summarize that, to point out that within the substantive framework, there are certain types of broad relief that have been built into the basic pricing rules, and among them are the following, though this is not an exclusive list.

Volatile pricing authority is accorded those firms whose products are particularly sensitive to rapid movements in raw material prices; the so-called multiindustry exception from prenotification requirements, which was adopted in phase II, has been continued in phase IV. And there are specific provisions for lost low-profit firms.

In addition, there is a regular interplay between firms subject to regulation and staff personnel of both the Council and the Internal Revenue Service. It has been standard operating procedure since the inception of the program for analysts to communicate directly with companies and seek from them additional information, fuller explanations, and generally to seek to obtain as complete an understanding of the problems involved as possible. Meetings are held with company officials; there is extensive telephone contact between the Council and the firms, and we are making every effort on a day-to-day basis to obtain as much information as we can.

Moreover, and I would emphasize this, aside from the contacts which take place in the formal context of filings or cases or specific

matters under consideration by the Council, there are innumerable and extensive informal contacts between the staff of the Council and the Internal Revenue Service and members of the public who are affected by the regulations. Innumerable telephone inquiries are received each week. We respond to specific inquiries informally and expeditiously in this way.

There are meetings with trade associations, consumer groups, farm organizations and so on. We have an extensive schedule of public appearances. In addition, questions are funnelled to us through congressional contacts, or through congressional offices, as constituents contact their Congressman or Senator and request information which we are in turn requested to provide.

Senator MATHIAS. I can testify as to the accuracy of that part of your statement.

Mr. WALKER. Thank you, sir.

Moreover, since early summer we have been meeting once or twice a week with members of the press who regularly cover the program to improve communications to members of the public through the media.

In short, the Council operates on the principle of easy access to members of the public. We are very sensitive to our responsibilities to communicate our policies to members of the public and to respond to questions and criticisms.

The next section of my statement deals with the organization and operation of the program, and I would also like to summarize that briefly, if I might.

The basic principle which has been adopted for the phase IV price stabilization program has been to delegate broad operating authority to the Internal Revenue Service to be exercised in a decentralized manner by key district offices. At the same time, the Council has retained authority to take action in certain areas, and, of course, the Council has the general responsibility to insure that the authority we have delegated is properly exercised. This system, I might add, of decentralized authority is in marked contrast to the phase II system under which most authority was concentrated in the Price Commission, with the IRS acting primarily in an investigative and informational capacity.

Operating authority has been placed in 29 key districts of the IRS, with the directors in these offices exercising functional supervision over the stabilization activities of other offices which perform primarily support functions.

IRS key district offices have authority to take actions on all filings subject to certain limitations established by the Council. On the next several pages I have outlined a breakdown of action on prenotifications, special filings, and a variety of other subjects.

Since the committee has a specific interest in exceptions, I might make specific reference to that.

The IRS district offices presently have the authority to take action, initial action, on exception cases, except for those listed in my statement: class exception requests; exception applications involving key industries with particularly sensitive price problems that we wish to monitor ourselves; exception applications having precedential effect; and so on. Health and insurance filings are made directly in Washington.

Reconsiderations are handled through the IRS conferee system; where the decision is made by the IRS, it is made at a higher level within the IRS district office than the initial decision, and a different group of persons is involved in evaluating the reconsideration that was involved in the initial decision.

I might emphasize at this point also that, for the present time and until a body of precedent has been developed, all reconsideration requests from exception denials, are being handled directly by the Council.

In any decentralized operational arrangement, there is bound to be some inconsistency and unevenness in decisionmaking. That is no less true here where the IRS conducts activities through 29 key district offices, each with significant operational authority. Consequently, the Council, together with the national office of the Internal Revenue Service, has undertaken a series of comprehensive efforts to insure consistency and efficiency of our efforts to the maximum extent possible.

And I have identified at some length a number of the efforts that we have made, including a rather extensive training activities on an on-going basis, regional conferences, and the like. We have initiated a series of what are called National Office Review programs, which involve in-depth review of both substantive decisions and operational procedures.

The Council has established a communications center to which all IRS key district offices are linked by telephone and facsimile equipment to facilitate prompt exchange of information. I might supplement my statement by advising the subcommittee that as of the close of business on October 5, the communications center had received 1,202 such direct telephone inquiries from IRS district officials seeking guidance on one or more matters of importance. We have, in addition, at the communications center received an additional 2,000 or more inquiries from other sources which we have dealt with.

In addition, we have an elaborate computer hookup, where each IRS district office is connected with our computer, which is physically located in Pittsburgh, by way of tie-lines. And on a daily basis, the IRS district offices post in the computer current information on filings and workloads and decisions and so on. So that, as a result, we can develop and have developed a management information system which enables us to track and monitor filings, workloads, and other items of interest within the system.

Now, to deal more specifically with the exceptions process in phase IV. As I said at the outset, a necessary effect of a wage-price program is to interfere with a person's normal way of doing business. Obviously, not every distortion merits treatment under the exceptions process and not every anomaly warrants relief. Otherwise, the program would quickly dissipate. In the establishment of procedures and criteria for an exceptions process there is of necessity a tradeoff between the need to assure procedural fairness and to minimize the potential for bureaucratic abuse on the one hand and the practical imperative to provide a prompt and efficient decisionmaking process on the other hand.

Under the Economic Stabilization Act, the Congress has followed the precedent of the Defense Production Act and has excluded the economic stabilization program from the requirements of the Administrative Procedure Act as they apply to adjudications in individual

cases, except for the provisions of 5 U.S.C. 555(e) relating to notice of denial of a request and a statement of the grounds for a denial. The statutory requirements for procedures in individual adjudications are set forth in section 207(b) of the Economic Stabilization Act, which is reproduced in my statement.

The Council's regulations governing procedures for obtaining an exception from the price regulations are set forth in part 155 of title 6 of the Code of Federal Regulations, and, as the subcommittee knows, these newly required provisions were set forth in phase IV, were revised and made more workable under those regulations, and the division of responsibility between the IRS and the Council was spelled out.

Initial action on a request may be made either at the IRS district level or by the Cost of Living Council.

Also, the regulations provide for hearing at the discretion of the Council or the IRS district office.

The Council has established a division of responsibility for deciding initial exceptions applications between the Council and IRS district and national offices which has been described earlier in my testimony. Until a body of precedent is established upon which the IRS districts may draw, all reconsideration requests from exceptions denials will be handled by the Council.

The Stabilization Act itself provides some guidance as to the criteria which are to be applied in administering individual exceptions to the regulations, and these are spelled out in the statute, as I have indicated in my testimony.

In its regulations, the Council has adopted the standards for exceptions in individual cases used by the Price Commission which were drawn upon in that statute. And as a practical matter, we have in phase IV broadened the scope of "gross inequity" to encompass the factors set out in subsection (b)(2) of section 203 of the act. The material set out with respect to "serious hardship" and "gross inequity" is set out in the phase IV handbook prepared for the use of the IRS which has been made available to the subcommittee.

And you will notice from a review of that substantive material that the process calls for a detailed and elaborate analysis of each request.

Several questions raised by the subcommittee in correspondence with the Council relate to hearings on exceptions, how often they are held, how valuable they are, how often the recommendation of the hearing officer is followed by the Council, and so on. In the practice of the Price Commission, hearings in the formal sense with a hearing officer were very rarely used during phase II in connection with exception requests. It is contemplated that the same will be true in phase IV in the price area.

As a practical matter, however, the analyst charged with preparing a case will have extensive telephone contact with the applicant for an exception to secure data and to clarify matters in the submission. In instances where it has been determined that an oral presentation will develop material that cannot be submitted in writing, the Council has permitted representatives of applicants to make such presentations and will continue to do so. And, I might add, it is very often the case that the analyst will meet with company representatives during the period of time the exception request is being considered to obtain the

views of the company in a more comprehensive form than is ordinarily the case in a written submission. I would emphasize that informality is the rule and every effort is made to secure all information relevant to an exception application without unduly delaying the decision-making process.

Now, I have outlined on the next several pages the internal procedures used both by the IRS and by the Council in reaching decisions on exception requests. I will not burden the record by reading all that, except to point out to the subcommittee and emphasize the fact that these decisions are made in a procedural format which is designed to insure that the responsible agency officials bring to bear their expertise and their knowledge and their sense of the larger responsibilities of the program to each and every exception request.

You will note that in my statement we refer to the exceptions group that is convened and recommends decisions on each of the general industrial and service sector exception requests.

I would like to correct my testimony. I indicated a format which I am advised has been changed. That paragraph should read:

Following analysis and supervisory review, a case is presented to a committee consisting of the Administrator of the Office of Food, who acts as chairman, a representative of the Office of General Counsel, who is the Assistant General Counsel for Food Matters, a representative of the Office of Economic Planning and Analysis, a representative of the Compliance Division of the Office of Operations, and a representative of the Exceptions Branch of the IRS national office. All exception cases following committee review are presented to the Administrator of the Office of Food for a decision.

A similar format applies to the health area, as is set out in my statement.

In all cases, if particularly difficult issues are raised, or if the review committee is unable to agree, the matter may be taken to the Council's executive committee, composed of the senior officials of the agency, and that has, in fact, happened on several occasions in the past several months. Also, all class exception requests are presented to the Deputy Director of the Council for decision.

In addition, as the subcommittee knows, the Council has appointed a committee of senior Government officials to oversee exceptions policy developments by the Council. To date, this group has been involved principally in preliminary decisions about exemptions policy and in conducting the public hearings which the agency has held in connection with proposed price increases in various industries—steel, autos, rubber, paper, and soap and detergent and so on.

It continues, however, to be the Council's intention to involve these individuals in the exceptions process and we will do so as reconsideration is sought of initial Council decisions. To this time there have been only five reconsiderations filed, and those very recently. None have come up for decision yet. Thus, this group will be involved at the appellate stage, rather than at the first level of decisionmaking.

Finally, Mr. Chairman, like most endeavors, the administration of phase IV could no doubt be improved. We are continually monitoring it and will surely make changes as time goes along. However, we will also be interested in receiving the subcommittee's views on the various subjects we have discussed, we look forward to your suggestions, and we appreciate this opportunity to appear before you.

My colleagues and I are prepared to respond to your questions, sir. Senator MATHIAS. Thank you very much, Mr. Walker.

I think your statement is helpful. I think it is one of the most complete expositions of the Council's operations that the public has had to date, and I think it would be very useful, because, as you know and as you suggest yourself in your closing remarks, the purposes of these hearings are, number one, to try to develop the information upon which Congress can improve the Economic Stabilization Act when it comes up for renewal. In the inexorable course of time, it will.

And secondly, to assist you in improving the operations as they are reflected in comments that we get from the public, which, as you indicated, come to us as part of the constituent function of every congressional office.

And thirdly, to broaden the public knowledge and the public understanding of the act, which I happen to believe will make your job easier. If there is a wider public awareness of exactly what is intended and how it is to be accomplished, I think you can lower your workload.

I do not know that we can sustain the high level of literary interest with which you opened your remarks, but when you were commenting upon the fact that the Congress and the executive branch together had decided that some controls are necessary which is, of course, right. I was reminded a little of the story that Samuel Johnson used to illustrate a point that he had to make one day. And he said, it is a little like a dog walking on its hind legs. He said, sir, we wonder not that it is well done but that it is done at all.

That is a little bit our situation. We have got a dog up on his hind legs, and he is staggering around a little bit. And I think we can all tolerate that imperfect performance for a very short period of time, but if we are to keep that dog up on his hind legs for a very extended period of time, then, I think we have to train him to walk better than when he started out. And that is really where we are going.

Your statement is so complete that it suggests a number of questions, one of which, of course, is the philosophy of the whole attempt to stabilize the economy.

In your statement you said that the controls are deliberately designed to interfere directly with people's economic behavior, and that dislocation, distortion and delay are the inevitable results of that process.

If we are to accept that thesis, I still think you come to a point where the degree of distortion, dislocation and delay has to be measured against the consequences of allowing the free economy to have its full range, and you decide which is the most tolerable, which is the least tolerable. In other words, somebody has to make a decision as to what is the limit of toleration here.

Now, how do we decide what is intolerable? How do we decide that the process of control has become in itself an inflationary factor, or that the process itself has become less tolerable than what might otherwise be the case?

And let me say that in posing that, I am not antagonistic to the concept that there are moments in economic history when government has to act. I was one of those members of the Senate who, in the summer of 1971, prior to the announcement of phase I, had introduced legislation which called for an incomes policy. So I do not start out as being unsympathetic to the problem you have, but I just wonder how you feel about how we do decide what the breaking point is.

Mr. WALKER. Well, that is obviously a broad question, and let me try to respond to it in a couple of ways, if I may.

I think it is important at the outset to have in mind the time perspective over which we are now looking in retrospect, over the stabilization program in two ways: one, as to the administrative mechanisms that have been devised during that time period; and secondly, the nature of the economic problems that are being sought to be dealt with by those mechanisms which have differed from time to time.

I know it is not the purpose of this committee to get into the substantive economic policies of the administration or the stabilization program, but they are in many ways inseparable from the manner in which the program is operated.

Senator MATTHIAS. That is right. If it cannot operate so that people can live with it, then that goes to the very heart of whether or not you should do it.

Mr. WALKER. That is right. I would agree with that.

And on the other side of that same coin, if it is to do the job that it set out to do, then it must do it in a manner that addresses the real economic problems.

I would suggest to the subcommittee that the economic conditions which prevailed in 1971 when the program started and those same economic conditions prevailed during most of phase II, was the situation of a cost push inflation, fired principally by the wage-price spiral, where a controls program aimed at cost passthrough, full cost passthrough, coupled with some restraint on the labor cost element of the equation, was a very appropriate economic response to the problems that were then perceived.

However, by the early part of this year, it became apparent that we were entering into a much different economic climate. And that became particularly pronounced by June of this year, when the President felt compelled to establish the second freeze and to move to phase IV, where we have what amounts to a commodity inflation with enormous increases in the prices of basic raw materials—of those commodities that are grown on the land and those that are dug out of the land and which are inputs to so many of the products that we buy and that we eat and that we use every day.

A system that permits all of those costs, those initial costs in the production system, to run down through the pipeline of economic production will inevitably have a very much lesser constraining effect upon inflation than a system which seeks to squeeze some of those prices and those costs as they move through the system, and which seeks to spread them over time.

Consequently, to the extent that phase IV has been described as a tough program—tough even by comparison with phase II, which in some sense was a form of benign effort, coinciding as it did with a different economic climate—that toughness is a reflection of the economic job that had to be done. And in fact, I would suggest a very good argument can be made for the proposition that in order to accomplish the price stabilization goals and the mandate of the statute under which we operate, there is far more of a requirement to interfere directly today with economic decisionmaking in the private sector than was true previously.

And as a result, we now have a system of controls which, in fact, does that. Obviously, the balance between the toughness of the program, on

the one hand, versus the desirability of getting the job done on the other hand, is a matter over which reasonable men may differ over long periods of time. And I would suspect, as you would, that this kind of inquiry will occupy Ph. D. dissertations in the field of economics and political science for decades to come.

Nonetheless, I think it is a fair observation to make that the character of the program which we are now operating is a very direct reflection of the economic conditions which the country is currently experiencing.

Senator MATHIAS. Yesterday we had several witnesses before the committee and they represented a rather broad range of American economic interests. We had a lawyer who represents a firm that I suppose has as its clients some of the larger economic interests in the country. We had a spokesman for one of the Nader groups and a spokesman for one of the consumer groups, and we had a spokesman for one of the trade associations, the gasoline retailers.

Now, it was curious to me—and I suppose this is almost the first time in my congressional experience that we had these three widely diversified spokesmen all in solid agreement that they are increasingly having the kind of problems living with this program that bring them to the point of questioning it.

Now, this, it seems to me, is dangerous.

Mr. WALKER. In a sense, I am encouraged that the Cost of Living Council is acting as a unifying force in our society. But beyond that, let me comment on your observation because it is one that has troubled us.

Senator MATHIAS. Well, let me just interject here that I think if you want to be a unifying force, I would like to see you do it in a more positive way.

Mr. WALKER. Well, I would suggest that in fact what we are witnessing is in many senses a positive reaction, but let me put that aside for a moment and perhaps you would want to come back to it.

One of the difficult—and this is a bit of a philosophic issue—but one of the difficult problems that we have faced—we found it through the consultation in the development of phase IV—we found it in the comment process on our proposed regs, we found it in the administration of phase IV, is the following kind of difficulty: virtually every producer that one speaks to is convinced that the program is too tough, that the rules are too inflexible, that the regulations are too complicated, that the procedures are too time consuming, and that the program itself is one which impinges far too greatly upon their ability to carry out their economic functions.

Senator MATHIAS. Well, now, maybe I could be some help here because that was not my conception of really the thrust of their complaint. Their complaint went to really a more primary level than that. It was that as the program is now operating, they had no benchmarks upon which to guide business behavior, business reaction, that they had difficulty in securing information or in securing reaction from the Cost of Living Council to information which they could provide, and that there was inadequate public access generally to the Council's procedure, and there was inadequate opportunity for the public to register not only its views, but the enormous volume of information, business information, which the public holds and which could be ground into this process.

And I noted particularly in your statement that you referred again and again and again to the opportunities for public contact.

Mr. WALKER. Yes, I would emphasize that.

Senator MATHIAS. And I would emphasize that because it is in such direct contradiction to the unanimous testimony that we had yesterday.

Mr. WALKER. Well, let me respond specifically to your point and then return to the broader question. Specifically, we have made an effort, and I felt very strongly at the inception that this effort was vital. John Dunlop fully supports this notion that it is absolutely critical in the operation of a program like ours, although in government generally, but particularly in an operation like ours, to insure that those who are regulated have an input into the regulations. Those who are going to be subject to our rules, participate in the rulemaking process.

And I would only reemphasize the fact that since—well, really, since the middle of phase III, and certainly in all of phase IV, we have made every effort to insure that our rules are published first for comment, those comments are reviewed in detail, and as those who are familiar with the program will testify, changes are made based upon the information that we get.

Senator MATHIAS. Well, now, what about this kind of situation which was brought to our attention where notice of the proposed rule is published in the Federal Register with time for comment severely constricted. The Federal Register takes several days to get distributed around the country, and by the time the concerned parties, the business that will be affected, hear about it or the consumer groups that might be affected hear about it, the record is closed.

Mr. WALKER. Well, I am not familiar with the specific instances that the gentlemen may have referred to.

Senator MATHIAS. Well, I will not refer to them in detail because our record is an open record.

Mr. WALKER. Well, I will be glad to furnish for the record, if that will be helpful, the proposed rulemakings we have issued.¹ It is fair to say, however, that we have not provided 60-day notice periods, or 45-day notice periods, or in some cases, not even 30-day notice periods.

Senator MATHIAS. How about a week?

Mr. WALKER. We have on occasion provided as little as a week, although I can think of only one occasion on which that was the case. That was where we gave notice of a hearing on automobile prices and provided an opportunity for people to testify.

But one of the things that we do is to make that available to the press immediately, and there has been widespread press comment on that sort of announcement. In that case we also took the step of telephoning, in fact, Ralph Nader, asking him and inviting him to testify, as well as representatives of the companies that we wanted to testify, and various other informed individuals whose views we felt would be useful to the Council.

However, that short timeframe has been the exception rather than the rule. We have, it is fair to say, often used a time period of from, say, 2 to 3 weeks, but again, those who are most directly affected by the regulations, subscribe to the various services that carry our rules

¹ See proposed rulemakings referred to on p. 410.

and regulations, and they received twice or three times a week packages of updating material in which this information is contained.

I think generally speaking it is fair to say that we operate on a shorter time horizon than is customary in the Federal Government. I would stipulate to that, if that is the point of the objection that is raised with you.

I would argue, however, that to operate in a different fashion would be to perform a disservice both to those who are being regulated and to the general public whom it is our effort to make the beneficiaries of the program.

Senator MATTHIAS. Well, they further complained—and this is not just these witnesses yesterday but you get it all the time, that when the rules are made with or without notice, adequate notice, that then they have difficulty in securing from the Council the base information upon which those determinations had been arrived at.

Mr. WALKER. Well, I find that a difficult generalization to respond to. I would say this to you, Mr. Chairman, that it has been my personal effort, and I have participated rather fully and lengthily, I might add, in the writing and the preparation of virtually every document of a legal nature that the Council has issued, to insure that our preambles set out in very elaborate detail the rationales that underlie the decisions which those rules embody.

Now, obviously one cannot prepare a treatise on each such item, but we have sought to set out in a full and reasonable way, the rationale upon which our decisions are grounded, and we intend to continue to do just that.

Senator MATTHIAS. Well, I do not think they seek any treatise. They would like to see facts, statistics which they of course may wish to contest. That would be one of the reasons they might want to see them. They may feel that they have sounder figures which they would like to bring to the attention of the Council. But they are unable to do so and therefore unable to establish a dialogue with the Council on what the base ought to be if they do not know where you have started.

Mr. WALKER. Well, I find that difficult to accept, Mr. Chairman. To the extent that parties seek information from us, we seek to be as responsive to getting that information as we can. Now, there may be cases where we have not been as responsive as we should be. I am not here to propose that our record is without blemish. But to the extent that affected individuals have a specific area of inquiry, we seek to be responsive to that inquiry and to provide the facts, and again, I would reemphasize the fact that we have to an extent I believe unparalleled in the history of price stabilization, made available to members of the public the rationale and the thinking behind the decisions that we have reached.

Senator MATTHIAS. Let me just ask you two examples out of your statement this morning.

In your statement, under the heading of Exceptions, the third item there is exception application having precedential effect or presenting major policy issues.

Now, how would the public be guided, or how would the public know who would make that kind of decision and on what basis it would be made?

Mr. WALKER. Well, a fair question, a very difficult question to answer. How is the Council going to make that decision? How is the Internal Revenue Service going to make the decision?

Part of the difficulty which we face, and which any organization in our position faces, is the bewildering variety of problems which we are confronted with. As people say, everything is related to everything else, but that seems to be particularly true when one is making economic decisions.

I am reminded, for example, of an application that we have currently under review by the fertilizer industry for either price relief or for exemption, and without going into all of the permutations of it, one of the things we find is that nitrogen fertilizer is made with ammonia. Ammonia is a feed stock. In order to make ammonia you have to have natural gas. We have shortages of natural gas. Providing price relief in the face of natural gas shortages probably would not increase the available supply. On the other hand, if we let ammonia prices rise, on the thought that perhaps you could draw forth some additional supply, we are advised by the explosives industry that that will price them out of the market for ammonia which they use for explosives, which are vitally needed in the mining industry, which represents one of those primary commodity fields where we are experiencing severe inflationary pressures.

Now, there simply is no way to categorize in any comprehensive way the variety of the problems that American industry and American labor is going to confront us with. Consequently, there is inevitably going to be an exercise of judgment on the part of the policymakers of the Council as to which of the hundreds of thousands of problems that we address on a regular basis, warrant treatment as precedential matters or as policymaking matters.

Senator MATHIAS. Well, of course, to make it clear that I am not loading all of this on your table. I think Congress has not given you very much help in this whole area of the broad outlines.

Mr. WALKER. Well, we do hear from Congress on a number of the specific items.

Senator MATHIAS. Well, in the statutory act, I am talking about. I am talking about in the statute itself which reflects the difficulty that you are discussing.

Mr. WALKER. Yes. I think I would——

Senator MATHIAS. Congress found it difficult, too.

Mr. WALKER. I would have the same question as to whether, if we have difficulty articulating that sort of thing in regulatory form, which is a far more flexible process, I would have questions as to the extent to which Congress could do that.

Senator MATHIAS. In your statement——

Mr. WALKER. Well, excuse me. If I could add one more thought on that, Mr. Chairman.

Clearly, given the role that we have to perform, and the policy objective that is our principal aim, we must of course give attention to those economic events that have the largest effect, and consequently something involving the steel industry or the automotive industry or the rubber industry or one of the other chemical industries, one of the other giants of American industry, is something that by virtue of its potential impact upon the economy, will have far more likelihood of receiving our attention as should properly be the case.

Senator MATHIAS. In your statement, just to pick out one more area to raise with you, you say "informality is the rule and every effort is made to secure all information relevant to an exception application without unduly delaying the decisionmaking process."

Well, now, granting the full force and effect of that statement, is it not true that this is however still largely done within the four walls of the Cost of Living Council, that this is not a public process? This is a process which is really *in camera*.

Mr. WALKER. I do not know if I would characterize it as being *in camera*. It is not a public process in the sense of a public hearing, but it is very much our effort to go outside the expertise of our agency, which is limited as any group of individuals' expertise is limited, and to seek information from companies, from other government agencies, from published material, and generally to obtain as full an understanding of the problem as is possible.

Mr. EMLEY. Mr. Chairman, I might add a point on that, that one of the reasons in diversifying and giving additional assistance to the public and responsibilities to the Internal Revenue Service in this portion of the program was to enhance the public level of contact.

There is a great deal of effort, time and attention that is spent training, et cetera, whereby the revenue agents in the daily contact with the people submitting the exceptions, will work on a very informal basis to make sure that the problems are clearly stated prior to submission for processing at either the IRS level or in conjunction with the Cost of Living Council itself. So there is a good deal of informal contact that goes on in terms of working out and defining the problem prior to submission.

Senator MATHIAS. And in training your Internal Revenue Service associates, do you provide them with written instructions, training manuals?

Mr. EMLEY. Yes, sir, we do. We have gone over those. We have gone through a second revision of the manual, and as a matter of fact, we are continually revising them and working with the field offices of the Internal Revenue Service to develop broader and more comprehensive type procedures.

Senator MATHIAS. And are all of those manuals available?

Mr. EMLEY. Yes, sir.

Senator MATHIAS. I believe Mr. Walker has submitted—

Mr. WALKER. Yes, I have submitted for the record the current handbook,¹ although that is undergoing revision now to reflect the experience that we have accumulated over the first—well, it is now a little over 2 months of phase IV, and I would expect that that will be a document that will be continually and repeatedly updated.

Senator MATHIAS. Well, could I request that you keep the committee informed of revisions so that we could have a complete and current copy of it?

Mr. WALKER. We would be pleased to do so, and as a matter of fact, we will go beyond that and we will be glad to provide the committee on a regular basis with all of the rulings and decisions and regulation changes that we issue which come out on a very rapid fire basis.

Senator MATHIAS. You stated at one point there that there were 1,020 inquiries in which the Internal Revenue Service had sought

¹ See vol. 2 of these hearings.

guidance, which seems to me to illustrate the problem that we—it illustrates your problem as well as the public's problem.

Now, obviously you cannot compare the Cost of Living Council's program with two or three centuries of case law in which lawyers can go to the reported decisions of courts and find some guidelines for their clients which the public can read and draw some reasonable deductions, and I do not have any expectations, and I am not laying that kind of responsibility on you, but I think if the public had a wider knowledge here, you could reduce that workload of inquiry.

Mr. WALKER. I fully share that view, Mr. Chairman, and I might say that that has been uppermost in my mind as we have gone along in phase IV. I might make two observations in that connection.

First is just by way of information, that we have undertaken negotiations with Commerce Clearing House to seek to have them publish in their entirety all of the exceptions decisions that we issue so that there will be in a sense a published body of case precedent. I might supplement that also by stating that since phase IV began and the exceptions process has taken the form that I have indicated, we have made every effort to articulate in a very full way the rationale that underlies our exceptions decisions so that there is no mystery about this and the use of boiler plate is minimized, because I think it is important that people know what our rules are. And I am as anxious as you to minimize the duplication of effort which would necessarily result if we were not to communicate our decisions to people.

But a second point, is perhaps even more important. One of the trade-offs that one, I think, has to keep in mind between establishing a firm set of precedents on an existing body of regulations on the one hand, and on the other hand, modifying and changing that body of administrative precedent in the regulatory scheme on a regular basis, is the following. We find in the exceptions process, through prenotifications, through application for loss or low-profit applications or any one of 50 or so different ways that information comes into the Council, that people bring to our attention problems that are posed by the regulations as they apply to their particular company situation or industry situation, or historical situation, anomalies which ought to be addressed in the regulations, circumstances which we did not foresee, implications that derive from the application of the regulations that warrant change. And it is our feeling—

Senator MATHIAS. Well, now, if you will let me interrupt you right there, this is exactly where I think taking an extra week of notice to the public prior to preparing the regulations would bring in to the Cost of Living Council these very anomalies and exceptions and unusual situations in advance.

Mr. WALKER. Well, Mr. Chairman, I understand that and I appreciate that. I think that we have sought to use the comment period very extensively in phase IV for that very purpose, but even with that, people sometimes do not look at proposed regulations and do not really home in on them as they apply to their specific situation until they are faced with having to comply.

Senator MATHIAS. Very often there is the attitude of saying who, me? until they get to that.

Mr. WALKER. Yes, sure, and that is a very natural, and normal sort of thing.

But the point I was going to make which we feel is important is that we feel it is our responsibility to insure that these regulations are not locked in concrete, are not carved on stone, but ought to be changed to reflect the reality of the economic circumstances in which people find themselves, and so we are regularly making changes to improve and make more workable the regulatory scheme, and that is a very fundamental way in which members of the public obtain relief from the Council; that is, to bring to our attention problems that ought to be changed in the regulations, and then make a change to accommodate that problem.

Senator MATHIAS. You have very kindly given us a copy of your organizational chart.¹

Mr. WALKER. Yes.

Senator MATHIAS. How many people are now involved as employees or agents or officials of the Cost of Living Council and as associated Internal Revenue Service agents enforcing the orders?

Mr. WALKER. I would have to ask Mr. Emley to provide you with that information.

Mr. EMLEY. At the present time there are approximately 4,000 positions between the Cost of Living Council and the Internal Revenue Service. This is broken out into approximate figures of 900 in the Cost of Living Council and about 3,000 in the Internal Revenue Service, making a total of 3,900.

Senator MATHIAS. Thirty-nine hundred total.

Mr. EMLEY. Yes, sir.

Senator MATHIAS. Do you feel that that is the right number?

Is it the number that gives you a sense that you are able to keep up with the workload or is it too many or too few?

Mr. EMLEY. I think at the present time those numbers adequately reflect the volume of workload that we have anticipated, and hence are able to keep up with the processing workload before us. Should the workload change, fluctuate much beyond our estimates which we are currently tracking and allocating manpower, then obviously we would be seeking to revise those.

At the present time I think we are at a fairly good break-even point of resources and workload.

Senator MATHIAS. I am sure counsel has some questions. We have some questions from Senator Hathaway we were asked to propound.

I just have one other question at this point, and then I might have some later, but you referred to the Council's executive committee composed of senior Government officials, and is the makeup of that Council public?

Mr. WALKER. If I may inject a correction there, the executive committee of the Council is composed of the senior staff officials of the agency, those that appear on the organization sheet as heading various offices.

There is, in addition, an interagency policy advisory group, the membership of which I do not recall off the top of my head, but I believe Counsel has the press release that we issued in August in which we set out the names of the individuals. There is represented on it, an Assistant Secretary from the Department of Treasury, an Assistant Secretary from the Department of Commerce, an Assistant Secretary from the Department of Agriculture, and a member of the Council of Economic Advisers. I think those are the outside indi-

¹ See p. 26.

viduals, together with three or four senior staff officials of the agency.

Senator MATHIAS. Well, I hope you will excuse me. This question sounds skeptical, but does that group ever meet, or has it ever met?

Mr. WALKER. Oh, yes, yes. Your possible skepticism is unwarranted.

Senator MATHIAS. These interagency committees abound in Washington, and I find that they are often amongst the most defunct of all organizations.

Mr. WALKER. Yes, I understand and share that general view.

One of the unique factors of this agency—

Senator MATHIAS. They look good in the press release, you know.

Mr. WALKER. Well, let me be specific. First, the members of that interagency committee chaired and participated in the hearings that we held on the steel industry, the auto industry, the paper industry, the rubber tire industry, and the soap and detergent industry, and they will participate in other hearings.

Senator MATHIAS. Are these open hearings?

Mr. WALKER. Oh, yes. These were open hearings that were held at the Cost of Living Council with public notice and full participation by interested members of the public. Numerous written comments, in addition to written testimony, were received and were of assistance in making our decisions in cutting back some of those price increases.

In addition, the group has met, as we move into the preliminary stages of determining what sort of comprehensive exemption and de-control policy ought to be developed for the months ahead, and in addition, we have met on a whole array of policy issues that the Council must address. And I must say to you that the Council, because it has a uniquely horizontal mandate—our interests engage those of the Department of Agriculture and the Department of Commerce and so on and so forth, across the economy and across government—that we feel a peculiar need to secure the advice of these senior Government officials who can bring to bear expertise that we do not have in-house.

Senator MATHIAS. At this point in the record, I would like to introduce the press release to which Mr. Walker has just made reference.

[The press release referred to follows:]

[Cost of Living Council News Release, Aug. 23, 1973]

CLC ANNOUNCES ESTABLISHMENT OF A COMMITTEE OF SENIOR GOVERNMENT OFFICIALS

John T. Dunlop, Director of the Cost of Living Council, announced today the establishment of a committee of senior government officials to oversee development of general policy governing Council decisions on exception requests filed by individual companies or by a class of companies seeking relief under the price regulations in Phase IV of the Economic Stabilization Program.

Dr. Dunlop stated: "This top-level government committee will provide policy guidance to the Cost of Living Council on exception processing to help insure that exception requests are handled in an equitable and consistent manner throughout the country." He also added that he would ask this group to "advise the Cost of Living Council on disposition of precedent setting exception and prenotification cases and to assist in resolving major price issues before the Council."

"Phase IV is a tough system of mandatory controls for most sectors of the economy," Dr. Dunlop said. "A strict program of price controls involving considerable cost absorption by many firms requires a realistic and flexible exceptions policy to insure production and capacity expansion are not inhibited and that necessary relief is provided in genuine cases of serious hardship or gross inequity." While noting that the Council's efforts in Phase IV will be focused on moderating the excessive rate of inflation this country has experienced over the last six months, Dr. Dunlop indicated the importance of minimizing economic distortions in output and in investment planning which are endemic to a controls

program in an economy operating near capacity. "This committee," he said, "will have to walk a line between minimizing heavy economic costs that controls can generate and maintaining a strong and effective controls program constraining prices."

Chaired by the Deputy Director of the Cost of Living Council, James W. McLane, this committee will include: Edgar R. Fiedler, Assistant Secretary of Treasury for Economic Affairs; Sidney L. Jones, Assistant Secretary of Commerce for Economic Affairs; Gary L. Seevers, member, Council of Economic Advisers; William N. Walker, General Counsel of the Cost of Living Council; Marvin H. Kusters, Associate Director of the Cost of Living Council for Economic Policy; and Bert M. Concklin, Administrator of the Office of Price Stabilization in the Cost of Living Council. Representatives of other government agencies will be invited to participate in particular problems as appropriate.

Senator MATHIAS. Mr. Pecore, do you have any questions on behalf of Senator Ervin?

Mr. PECORE. Mr. Walker, I was very interested in the remark that you made in your prepared statement: "But it is a big job, it has to be done fast and the traditional ground rules of administrative procedure necessarily have only limited application in such a process."

Mr. WALKER. Yes.

Mr. PECORE. Now, we know from the Economic Stabilization Act of 1970, as amended, that the traditional ground rules of administrative procedure, at least outlined in the Administrative Procedures Act, have been suspended in your case, largely. There are a few sections of that statute that do apply.

Mr. WALKER. Yes.

Mr. PECORE. We also recognize that the statute creates a special jurisdiction and places a special responsibility on the Federal district courts and upon a special court, the Temporary Emergency Court of Appeals, to deal with cases and controversies which arise out of the administration of the statute and the regulations, and I am sure to help you with enforcement of the regulations as the case may be.

Would it be fair to say, or in your opinion do you feel, that your agency has been relieved of the responsibility of administrative proceedings to a large extent, and that this responsibility for review of disagreements with your orders and regulations has been fairly placed in the hands of the courts rather than as one of your primary responsibilities?

Mr. WALKER. Well, let me see if I can respond to that, Mr. Pecore.

First, while it is true that the statute has relieved us of certain formal responsibilities, my testimony has sought to indicate that we have made every effort consistent with the peculiar statutory mandate and policy objective that we are carrying out, to insure that we conduct ourselves in a manner that is consistent with the notions of basic fairness and due process which are ingrained in the way in which Government does business in this country. So, I would not characterize our activities as having divorced ourselves from that kind of concern. Quite the contrary, as I sought to emphasize, we have that kind of concern foremost in our mind because we are interacting on a daily basis in matters where exercise of judgment is required.

As far as the operation of the judicial review section specifically is concerned, it is my view that it has worked out in a manner that is entirely consistent with the statutory notion. That is to say, the district courts have the initial jurisdiction to hear cases arising out of the Stabilization Act, except that they do not have jurisdiction to rule upon constitutional issues that are posed by the litigants. Then those

decisions are appealed to the Temporary Emergency Court of Appeals.

Now, the TECA has two very distinct advantages, both to us and to the Nation. First is that they are acting on a very much faster tract than is customary for courts of appeals. Decisions are often rendered within a week of oral argument. The time for briefing is much shorter. It is a much more truncated, much swifter process of review so that both the Government and the aggrieved party have some assurance that their issue will be resolved and resolved fast.

Secondly, it has the desirable feature of insuring that the court of appeals that deals with this subject is one that is generally familiar with the subject matter, has in mind rather directly the kinds of precedents that apply and can thereby bring to bear a more informed judgment to exercise oversight over us as well as to insure that the program is not unduly disrupted.

Mr. PECORE. Thank you.

Now, I believe the provisions of the special court procedures that are found in these statutes, as amended, have a certain historical connection with the Price Administration efforts of the early 1950's.

Mr. WALKER. Yes, that is correct.

Mr. PECORE. The appellate court procedures, the specialized jurisdiction, and so on, is perhaps an adaptation in some form or another of this previous arrangement that existed in the Korean days.

Now, my question is this: Have you in your responsibilities and those of your assistant counsels found it useful in the drawing of your regulations and in the applications of your responsibilities today, have you found it useful to refer to the prior court records and the prior decisions and the prior procedures which have been in effect under the price control apparatus that existed in the Korean days?

Mr. WALKER. Well, the answer to the first part of your question is yes. In fact, there is a direct parallel between the judicial review scheme that applied in Korea and I believe also in World War II, as well. This has been a consistent characteristic of stabilization programs in this country, and yes, clearly the judicial decisions that have been rendered there have provided us guidance.

I am not sure if you implied whether or not we submit to the court for informal advice, particular regulations or rulings that we have in mind, and if that was what you were getting at the answer was no, because the "case or controversy" rule continues to apply, and that court does not render hypothetical decisions.

Mr. PECORE. No, I was going to Senator Mathias' reference to the lawyers' use of precedents in determining future policy. I certainly did not imply or intend to imply any direct contact between yourself and the courts.

Mr. WALKER. It has been helpful I might add, one of the more recent controversies which enveloped the Council had to do with the maintenance of the freeze on beef prices after the freeze has been removed on several other commodities, and that issue was litigated. As a matter of fact, it was really sort of a classic example of why that sort of a system is necessary because at one point we had five district courts all around the country, Seattle, Corpus Christi, Philadelphia, San Francisco and Omaha, all simultaneously carrying on litigation involving the same issue, which spread the Justice Department fairly thin. The Department represents us in litigation. It spread some of our experts thin, and it spread some of our lawyers thin in writing affida-

vits for all this, and there were suits that were threatened in five or six other District Courts that ultimately were not brought. But what happened in that situation is that the first case that went to decision in San Francisco, the *Pacific Meat Jobbers Council v. Dunlop* case, went to the court of appeals within a week after the decision was rendered. And within a matter of a week or so after the oral argument, a comprehensive decision was issued by the TECA which put the entire matter to rest.

And from our viewpoint, that represents a very efficient use of Government resources, but at the same time assures the litigants of a fair and a very readily available avenue to seek redress.

Mr. PECORE. Now, I believe I am correct in recalling your earlier remark that you had something on the order of 1,200 problem areas, or 1,200 requests for decisions?

What again was that?

Mr. WALKER. My remark was in the context of the communications center which we maintain in the Cost of Living Council, which is our primary point of interface between the Council and the district offices of the IRS.

And the way in which that center operates is, when the IRS revenue agent who is working on stabilization matters in Cleveland or Chicago or whatever has a question about what is the applicability of the regulations in this sort of situation, or what is the answer to this question, and he is not confident of the answer, he calls the communications center. We have 13 or 14 people assigned there, and if they can answer it immediately on the phone, they give him the answer. Otherwise, the question is written up and we have a review group on which Mr. Munroe, my deputy, sits, as well as three or four other people from the affected offices in the Agency, and we try to get the answer back to the field within 48 hours. If we cannot get the answer within 48 hours, we tell him we cannot get it within 48 hours, and we staff it out and we get it out when we can.

Mr. PECORE. You would not characterize these 1,200 items of business, as being 1,200 potential cases or controversies?

Mr. WALKER. Oh, by no means. By no means. I would characterize those as inquiries.

Mr. PECORE. Inquiries. Yes.

Are you aware of the number of the cases that have actually been brought by citizens in the district courts under your regulations?

Mr. WALKER. I do not have that information at hand, Mr. Pecore. I would be glad to furnish that for the record.

Mr. PECORE. I believe it is something on the order of 50 cases as of the end of August. That is the readout that I have. As of the end of August 1973, there are some approximately 50 cases where the Government proceeded against individuals.

Mr. WALKER. I think it is considerably more than that. My recollection is 286 cases in which we have brought affirmative litigation.

Mr. PECORE. I was referring to the end of August as reflected in one of the Commerce Clearing House printouts. But the same source tells me there is something on the order of again approximately 50 cases in which people have sought redress, we will say, in the district court system.

But my real question and the real thrust of my thought is whether or not you feel, in your opinion, that the mechanism that the statute

provides, that is, by permitting a direct route through the Federal court system in the controversial cases which arise in the efforts to control the economy, whether that special provision is adequate as a sounding board which provides effective means of assuring due process?

Mr. WALKER. Yes, I think it has. As I have indicated, and as I indicated a moment ago, I think that kind of system is essential, both from our standpoint as administrators of the program and from the standpoint of the public.

Where an issue cannot be reconciled and where parties feel aggrieved, then there ought to be a means of promptly resolving the issue in the courts. And the procedure established by the statute provides just that: Expeditionary judicial review of administrative discretion, and I think that is very desirable.

Mr. PECORE. I have no further questions.

Thank you, sir.

Senator MATHIAS. Mr. Rodgers.

Mr. RODGERS. Thank you.

Mr. Walker, you have provided the committee with a copy of, I believe it is officially entitled the "Phase IV Handbook, Revised," which we have been calling the IRS manual.¹

Mr. WALKER. Yes.

Mr. RODGERS. As I understand it, this is provided to the personnel of the agency for purposes of giving guidance in reaching decisions under the program.

Mr. WALKER. It is provided for a whole variety of reasons. As you understand from having looked at it, it covers both the manner of administering the program and the manner of posting things in the computer, and a whole wide range of subjects.

Mr. RODGERS. I would also point out that you were kind enough to provide us with the health care exceptions manual, which—I think it is a parallel document in that specific area.

Mr. WALKER. Yes. Because the health area is no longer being serviced by the Internal Revenue Service; it is being administered internally. It was formerly being administered by the IRS, but has been brought back internally. So the manual we have furnished to the committee is simply an adaptation and an updating of what was formerly an IRS health manual.

Mr. RODGERS. Are there other sources of guidelines, either with respect to other areas, such as insurance or wages, or with respect to a greater depth of analytical standards in these areas, that would be applied to any of these cases?

Mr. WALKER. Well, we have also furnished to the committee, I believe, a copy of guidance on handling exceptional requests in the petroleum industry. But there are no similar sorts of documents in other areas.

On the wage side, the IRS does not have an administrative role. I mentioned in my statement that these comments I am making really are directed pretty exclusively toward the price side, since I understand that is the principal area of your interest.

¹ See vol. 2 of these hearings.

Mr. RODGERS. Well, in fact, we were interested in both sides.

But what I am interested in ascertaining is whether or not there are any other written sources of standards that would be applied?

Mr. WALKER. None of which I am aware.

Mr. RODGERS. I had a number of questions about the manual which I think, in the interest of time, we will forgo and submit to you later in writing.

But I did want to ask you, or point out one thing to you, and see if I could ask it in the context of the prior questions. On page 51 of the manual, section 2—and I will read that section—

Interpretation is a written statement issued by the district director or his delegate in response to a written request concerning the application of the regulations to a specific act or transaction. Districts may issue interpretations where there are clear and sufficient guidelines, precedents, rulings, or regulations, on which to base a determination.

My question really is, is this IRS manual, are these IRS manuals—do they constitute the full range of guidelines or precedents? And if not, what else might there be, and which of that material is made available to the public?

Mr. WALKER. Well, the next section, just to follow on, section 3.02 says:

Where there are insufficient guidelines, precedents, or where policy issues are involved, the request for interpretation should be telephoned or faxed to the Cost of Living Council.

We specifically have divided the responsibility for issuing interpretations between IRS and ourselves in this way. Where the road is clear, IRS has full authority to go ahead and issue an interpretation, but where the questions are novel or new or involve important matters of policy, then we wish to be consulted, and in that case, the interpretation would be issued by us.

Now, strangely—and I am interested in this, and I had not realized it until I began preparing my testimony to come up here—we have received a very small number of written requests for interpretations. Of course, we have received goodness knows how many telephone calls each week which we try to answer and respond to in as helpful a way as we can. But I am advised that we have fewer than 50 requests for interpretations that have been received from members of the public on our regulations.

But to complete this, we have not published or we have not issued many interpretations as yet. Most of them have been coming in the last 10 days or 2 weeks, as people are interacting more directly with the regulations as time goes on. But it is my intention, as we are going to do with exception decisions, to see if we cannot get the Commerce Clearing House to publish those verbatim, so that that body of information will also be available to members of the public.

I might also add, if I might just interrupt further, to say that, as we issue decisions for requests on exemptions, I expect to make those available to the public as well, for the reasons that I indicated in response to the chairman's inquiry.

Senator MATHIAS. I have, as I indicated earlier, some written questions that are propounded by Senator Hathaway. Since they are in

writing, perhaps we could save time if I could give them to you, and you could respond to them in writing.

Mr. WALKER. I would be glad to respond to them.

Senator MATHIAS. If we could ask you to do that within a week, we will hold the record open for that period of time. They will be included in the record.

Mr. WALKER. Fine. I would be pleased to respond.

[The questions and answers referred to follow:]

QUESTIONS SUBMITTED BY SENATOR WILLIAM D. HATHAWAY TO WILLIAM N. WALKER, ACTING DEPUTY DIRECTOR, COST OF LIVING COUNCIL, IN HEARINGS BEFORE THE SUBCOMMITTEE ON SEPARATION OF POWERS, OCTOBER 10, 1973, FOLLOWED BY RESPONSE OF THE CLC IN THE FORM OF A LETTER WITH ENCLOSURES DIRECTED TO SUBCOMMITTEE COUNSEL

UNITED STATES SENATE,
COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS,
Washington, D.C., October 10, 1973.

I have some questions regarding the implementation of the Public Access section of the Economic Stabilization Program regulations.

What procedures are being followed to ascertain whether all companies which are subject to the public disclosure requirement under the provisions of the Economic Stabilization Act are in fact complying with the requirement and submitting forms for public disclosure? What steps are being taken to bring those which are not in compliance into compliance with the law?

There appear to be problems in this area. Staff members from the Joint Economic Committee informed me that they had requested disclosure forms for all the steel companies but had only received documents from two companies. When they asked the Cost of Living Council to determine whether others were subject to public disclosure, they were informed that this was not possible because the forms had all been sent to the appropriate district IRS offices. Obviously the forms should be kept on hand by the central CLC office, for security and for disclosure should this be warranted.

In view of the public interest involved and in view of the fact that the number of companies affected is rather small, I believe CLC should be able to establish procedures to insure compliance with the public disclosure law.

What procedures have been instituted to insure that companies which are subject to public disclosure reveal all of the information they are required to reveal under the CLC regulations.

As you are aware, I consider the regulations to be far too narrow as they stand, and I feel they violate the intent of the law.

Thus I am further disturbed to see that companies are not even complying with CLC's very minimal requirements and that apparently nothing is being done to make them comply. For example, in the attached forms from two steel companies, one company has left out the percentage cost justification figures and the other has furnished little more than the name and address of the company. Since these forms were provided by CLC in response to a Congressional request, it appears that no attempt is being made to enforce the regulations on public disclosure.

Please provide information on requests CLC has received for public disclosure reports and how they have been filled.

Form CLC-2

Prenotification, Report, or Record of Prices,
Costs, and Profits

(May 1973)

Dept. of Living
Council
2000 M St. NW,
Washington, D.C.
20540Lumber
01
1st expires:
April 1974

Form applies to:

- ☒ Reporting parent and consolidated entities
☐ Reporting unconsolidated entity.
 Parent name: _____
- ☐ Recordkeeping parent and consolidated entities
☐ Recordkeeping unconsolidated entity.
 Parent name: _____

CLC-200 Form, 10-10-73

Parent

Unconsolidated Entity

Reference Number

Batch Number

Type of submission

(a) ☐ Prenotification (b) ☒ Quarterly report (c) ☒ Other $\triangleright$ Public Disclosure Required

Part I.—Identification Data

1 (a) Name of parent or unconsolidated entity to which this form applies

Jones & Laughlin Steel Corporation

(b) Address (Number and street)

#3 Gateway Center

(c) City or town, State and ZIP code

Pittsburgh, Pennsylvania 15230

(d) Chief executive officer

W. R. Roesch

2 Is this a resubmission? 3 Ending date of most recently completed fiscal year 4 Reporting period ending date 5 To be completed by Parent only:

(a) ☐ Yes
(b) ☒ NoMONTH DAY YEAR
1 2 3 1 7 2MONTH DAY YEAR
3 1 7 3

Annual Sales or Revenues \$ 000

Part II.—Calculation of Base Period Profit Margin (Enter dollar amounts with 000 omitted and percentages to 2 decimal places.)

6 Base year 1 net sales—fiscal year ended	MONTH DAY YEAR	\$	
Base year 2 net sales—fiscal year ended	MONTH DAY YEAR	\$	
total (Add item 6 and 7)		\$	
Base year 1 operating income		\$	
Base year 2 operating income		\$	
11 Total (Add item 9 and 10)		\$	
12 Base period profit margin (Divide item 11 by item 8)			%

Part III.—Calculation of Profit Variation (Enter dollar amounts with 000 omitted and percentages to 2 decimal places.)

	Current Period	Same Period Prior Year
13 Net sales	\$	\$
14 Base period profit margin (From Part II, item 12)	%	
15 Target current period profit (item 13 times item 14)	\$	
16 Actual operating income	\$	\$
17 Current profit under (over) target profit (Subtract item 16 from item 15)	\$ 1,580	

Part IV.—Additional Information

18 (a) Name and title of individual to be contacted for further information W. N. Merchant, Controller
 (b) Address (Number and street) #3 Gateway Center
 (c) City or town, State and ZIP code Pittsburgh, Pennsylvania 15230 (d) Phone number (include area code) (412) 565-3404

19 You must maintain for possible inspection and audit, a record of all price changes subsequent to November 13, 1971. Give location of such records. $\triangleright$ #3 Gateway Center, Pittsburgh, Pennsylvania 15230

Part V.—Certification

I certify that the information submitted on and with this Form is factually correct, complete, and in accordance with Economic Stabilization Regulations (Title 6, Code of Federal Regulations) and instructions to Form CLC-2.

Type name and title of the Chief Executive Officer of parent or other authorized Executive Officer and date of signing.

 Name $\triangleright$ R. B. Peabody
 Title $\triangleright$ Vice President - Corporate Affairs Date $\triangleright$ 6/27/73
Signature $\triangleright$ R. B. Peabody

SCHEDULE A

Part VI,
line No.

Line No.		SIC
3	Tubular products-----	3312
		3317
5	Red and wire products-----	3331
		3312
6	Cold finished bars-----	3312
		3316
12	Conduit products-----	3312
		3644
13	Container products-----	3312
		3491
14	Wire rope products-----	3312
		3315

SCHEDULE B

PRICE DISCLOSURE INFORMATION

Substantial products whose prices were increased by 1.5% or more over the price lawfully in effect on January 10, 1973:

Line 7—Tin mill products, 4.59% increase effective February 16, 1973.

Form CLC-2

(May 1973)

Cost of Living
Council
2073 M St. NW.
Washington, D.C.
20553

OMB Number
172-R031
Approval expires:
April 1974

Prenotification, Report, or Record of Prices, Costs, and Profits

Form applies to:

☒ Reporting parent and consolidated entities.☐ Reporting unconsolidated entity.

Parent name: _____

☐ Recordkeeping parent and consolidated entities☐ Recordkeeping unconsolidated entity.

Parent name: _____

Parent

Uncensored Entity

Reference Number

Batch Number

Type of submission

(a) ☐ Prenotification (b) ☒ Quarterly report (c) ☒ Other > Public Disclosure Required

Part I.—Identification Data

1 (a) Name of parent or unconsolidated entity to which this form applies

NATIONAL STEEL CORPORATION

(b) Address (Number and street)

2800 Grant Building

(c) City or town, State and ZIP code

Pittsburgh, Penna. 15219

(d) Chief executive officer

G. A. Stinson

2 Is this a resubmission?

(a) ☒ Yes(b) ☐ No

3 Ending date of most recently completed fiscal year

MONTH

DAY

YEAR

123172

4 Reporting period ending date

MONTH

DAY

YEAR

133173

5 To be completed by Parent only:

Annual Sales or Revenues \$

000

Part II.—Calculation of Base Period Profit Margin (Enter dollar amounts with 000 omitted and percentages to 2 decimal places.)

	MONTH		DAY		YEAR			
6 Base year 1 net sales—fiscal year ended	1	2	3	1	6	8	\$	
7 Base year 2 net sales—fiscal year ended	1	2	3	1	6	9	\$	
8 Total (Add item 6 and 7)							\$	
9 Base year 1 operating income							\$	
10 Base year 2 operating income							\$	
11 Total (Add item 9 and 10)							\$	
12 Base period profit margin (Divide item 11 by item 8)								%

Part III.—Calculation of Profit Variation (Enter dollar amounts with 000 omitted and percentages to 2 decimal places.)

	Current Period	Same Period Prior Year
13 Net sales	\$	\$
14 Base period profit margin (From Part II, item 12)	%	%
15 Target current period profit (item 13 times item 14)	\$	\$
16 Actual operating income	\$	\$
17 Current profit under (over) target profit (Subtract item 16 from item 15)	Under 15,062	

Part IV.—Additional Information

18 (a) Name and title of individual to be contacted for further information W.S. Schwoebel, Sr. Vice Pres.—Finance

(b) Address (Number and street)

2800 Grant Building

(c) City or town, State and ZIP code

Pittsburgh, Penna. 15219

(d) Phone number (include area code)

412-471-560019 You must maintain for possible inspection and audit, a record of all price changes subsequent to November 13, 1971. Give location of such records. > 2800 Grant Building, Pittsburgh, Penna. 15219

Part V.—Certification

I certify that the information submitted on and with this form is factually correct, complete, and in accordance with Economic Stabilization Regulations (Title 6, Code of Federal Regulations) and instructions to Form CLC-2.

Type name and title of the Chief Executive Officer of parent or other authorized Executive Officer and date of signing.

Name > W.S. SchwoebelTitle > Sr. Vice Pres.—FinanceDate > June 27, 1973Signature > [Signature]

Price Information		Name of parent or consolidated entity (From Part I) Jones & Laughlin Steel Corporation													
Product or Service Line Description		Reporting Period						Cumulative Period							
		MONTH		DAY		YEAR		MONTH		DAY		YEAR			
		From:	1	1	73	To:	4	30	73	From:	1	1	73	To:	4
		4 Digit SIC	Sales (\$000 Omitted)		Weighted Average Percentage Price Increase		Per cent Change in Price		Maximum Price Increase		Sales (\$000 Omitted)		Weighted Average Percentage Price Increase		
(a)		(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)	(n)	
Flat Rolled (Excluding Plate & Skelp)		3312			6.02	(1.77)								1.77	
Bars & Skelp		3312			3.74	(1.23)								1.23	
Tubular Products		3312			3.77	(3.75)								3.75	
Hot Rolled Bars		3312			3.65	(0.75)								0.75	
Rod & Wire Products		3312			2.88	(2.61)								2.61	
Cold Finished Bars		3312			3.27	(3.77)								3.77	
Tin Mill Products		3312			1.45	(2.65)								2.65	
Stainless Bar, Rod & Wire		3312			(3.88)	(8.85)								8.85	
Stainless Sheets		3312			1.06	(8.21)								8.21	
Coil Chemical Products		3312			9.02	(2.70)								2.70	
Other Steel Mill Products		3312			-	(0.90)								0.90	
Cond it Products		3312			0.48	(3.12)								3.12	
Container Products		3312			(0.32)	(3.00)								3.00	
Wire Rope Products		3312			1.46	(0.56)								0.56	
Steel Service Center Division (Wholesale)		-			2.80	-								-	
Supply Division (Retail)		-			1.50	-								-	
(See Schedule A for units which include two different SIC codes.)															
Notes from Continuation Schedule					Express all price changes in the nearest 2 digit places.										
Notes (lines 1 through 20)															
Weighted Average Percentage Price Increase					1.52%	(2.41)	N.A.	%					7.41	%	
Sales of or from Foreign Operations															
Notes of Feed															
Other Non-applicable Sales															
Sales															

NATIONAL STEEL CORPORATION WEIGHTED AVERAGE INCREASES IN SELLING PRICES OF SUBSTANTIAL PRODUCTS SINCE JANUARY 10, 1973

	Average increase (percent)
Steel—Tin mill products	4.45
Aluminum products	3.32

**ECONOMIC STABILIZATION PROGRAM,
COST OF LIVING COUNCIL,
Washington, D.C., December 7, 1973.**

Mr. CLAIR WARREN RODGERS, Jr.,
Minority Counsel,
Separation of Powers Subcommittee,
Senate Committee on the Judiciary,
Washington, D.C.

DEAR QUINCY: This letter sets out our response to the written questions propounded by Senator Hathaway at the October 10, 1973 hearings before the Subcommittee.

1. What procedures are being followed to ascertain whether all companies which are subject to the public disclosure requirement under the provisions of the Economic Stabilization Act are in fact complying with the requirement and submitting forms for public disclosure?

As of November 1, the Council had received quarterly reports prepared for public disclosure from 208 companies with annual sales and revenues of \$250 million or more. These reports are available in the files of the Cost of Living Council and may be reviewed by members of the public in our Public Reference Facility.

We have taken a number of steps to insure full compliance with the public disclosure regulations.

On November 8, 1973, the Council sent a letter to each firm with \$250 million or more in annual sales and revenues reminding it of the public disclosure requirements, providing explicit guidance with respect to those requirements and requiring the submission of information from which compliance might readily be determined. A copy of the letter and the attachments is enclosed.¹ The letter

¹ See letter and attachments referred to on p. 293.

was accompanied by the language of the public disclosure amendment, the language of the Phase IV regulations on public disclosure, a questionnaire concerning public disclosure and a new public disclosure certification requirement.

The questionnaire required these firms to set forth the extent of their compliance with the public disclosure requirements. The returns we have received to this questionnaire are still being tabulated and are not available as of the date of this letter.

The certification requirement establishes a new obligation on the part of companies with \$250 million or more in annual sales and revenues, filing quarterly reports. Those which do not file reports prepared for public disclosure must certify that they are not subject to the public disclosure requirements. Finally, the Internal Revenue Service has instructed its staff to review compliance with the public disclosure requirements as a part of any audit which it conducts under Phase IV price regulations.

2. What procedures have been instituted to insure that companies which are subject to public disclosure reveal all of the information they are required to reveal under the CLC regulations?

Forms subject to the public disclosure requirement are filed at the IRS Key District Office in which the company's headquarters are located. Upon receipt of such forms, Key District Office personnel review the form to insure proper submission. If a form is incomplete or improperly completed, the company will be so notified and required to resubmit a corrected form.

3. Accessibility of forms subject to public disclosure.

Forms subject to public disclosure may be obtained from three places: the company, the IRS Key District Office in which the company headquarters are located, and from the Cost of Living Council.

As indicated above, the forms subject to public disclosure are originally filed in the IRS Key District Office in which the company's headquarters are located. After review by IRS personnel, one copy is placed in a file for public access at the Key District Office and two copies of the form are forwarded to the Cost of Living Council. This enables the Council to monitor public disclosure submissions and provides a central depository of forms subject to public disclosure. The IRS Key District Office also forwards the certification filed by companies which will also be accessible to the public. Both the forms subject to public disclosure and the certifications are maintained for public access in the CLC Reading Room and the IRS Key District Offices. Thus, interested members of the public will be able to determine the compliance of companies with \$250 million or more in annual sales or revenues by reference to public files.

4. Requests received by the Council for forms subject to public disclosure.

As of November 28, the Cost of Living Council Reading Room, located in Room B-120 of 2000 M Street, had 237 public disclosure submissions on file. The public is not required to sign in at this Reading Room and, therefore, the Council does not have an exact tally of the number of requests received to examine the forms. The supervisor of the Reading Room, however, estimates that in the last five months there have been approximately 8 requests a week for these forms.

The Council provides free copying for those who want copies of a limited number of forms.

In addition, the Council has answered several written requests by mailing out copies of the requested submissions.

We hope these responses will be of assistance to you. We will be happy to provide any further information you may desire.

Very truly yours,

ROBERT E. BRADFORD,
*Associate Director,
Congressional Affairs.*

Enclosure.

Senator MATHIAS. Just finally, as far as I am concerned, I would like to return to the question of the openness of the process, because I feel that is so enormously important to your success, as well as to the general welfare of the country. The openness of the process has got to be apparent, and I would submit that, not only from the limited testimony of yesterday, but from other indications, that that is not the case.

In *Fox Grocery v. United States*, Mr. Moses, who at the time that he participated in that case was the Director of the Exceptions and Health division of the Cost of Living Council, testified that the Council had benchmark criteria standards which had not been published.

And I will not attempt to summarize his testimony, but will include it as a part of the record. It is a typical kind of problem which arises again and again.

[Excerpts from the testimony of Gregory Moses, Director of Exceptions and Health Division, in the civil action entitled *Fox Grocery Co. v. CLC*, No. 73-375, before the U.S. District Court for the Western District of Pennsylvania follow:]

Q. Now, Mr. Moses, the Stabilization Act itself provides that the program shall provide for the making of exceptions to the normal regulations whenever it is necessary to foster orderly economic growth, prevent gross inequities, serious hardships, market disruptions, and several other factors that are related in the statute. Will you explain in general terms the manner in which this mandate of establishing exceptions procedures and the implementation of this has been implemented by the Price Commission and the Cost of Living Council?

A. Well, we have established the Office of Exceptions Review, which is responsible for processing all exceptions; and as a result, we prepared some preliminary types of cases which would—or types of criteria to be used in judging the statement serious hardship or gross inequity.

We have—for serious hardship, we made an awfully great deal of standard statistical accounting and statistical measures to measure a financial hardship; and under inequity, we have a series of benchmark situations and criteria that we take into recognition of just what is an inequity, and under all circumstances, and a hardship or an inequity must have been caused by the program. The program must cause that hardship or inequity.

Q. What are the—In addition to the hardships and inequity, and these quantitative threshold criteria you have referred to, what are some of the non-quantitative factors that you all will consider in reference to an inequity, or in reference to a market disruption, or the effect on total overall economic growth?

Mr. GERMAN. I object to this question and any succeeding questions on the basis that the government should be required to say what they did in the case at bar, and not what their regular practice is.

The COURT. Well, I think he is perhaps, Mr. German, making background to bring into focus the facts in this case. But we will let him go ahead with this, and if he doesn't pinpoint this case, why, it will be ruled out.

Mr. GERMAN. Thank you, Your Honor.

The COURT. This will be heard, subject to Mr. German's objection.

Mr. MILLER. Right.

By Mr. MILLER:

Q. My question, Mr. Moses, is, in addition to the quantitative factors, which we will refer to once we get into the litigation report, what are—or the litigation report, it is not a litigation report, it is the administrative record. I have been in the Tort Section too long, where all we used to get is litigation reports from agencies.

But what are some of the other factors considered in this process.

A. Well, we would look at what the national goals are. What is the goal of the economy?

One of the things that is in evidence now is that we want a reduction in food prices. The effect on the community, or are you going to create jobs lost? Is the plant going to close down or not? Other third-party effects.

We would look at the whole economic basis of the company. What kind of market disruption might be caused as a result of our order? Are we causing the company to be selling product below its cost?

You can apply for an exception to the regulation under any basis. So there were general criteria.

* * * * *

Q. All right. Now, you referred to certain criteria, benchmark standards which your agency used in determining whether or not an exception from the base period profit margin rules should be granted or denied; is that correct?

A. Yes, sir.

Q. Have those benchmark criteria and standards been published, indexed, notice of them given to persons who file exceptions before your Commission?

A. No, sir.

Q. Are they contained in internal agency manuals?

A. Some of them are, sir, yes, sir. Some of them are in internal agency manuals, yes, sir. But they are constantly being updated, so that's why I would say that.

Q. Are these criteria or standards or benchmarks, I think, as you called them, are they available to the public?

A. I would think so, yes, sir.

Q. Now, if I wanted to get them, how would I go about getting them as a member of the public?

A. I really don't know the procedure, sir, but I would imagine that you write to the Cost of Living Council and request them.

Q. And request the criteria used in denying or granting exceptions from base period profit margins?

A. I would think so. I would imagine so. I really don't know, sir.

Q. Do you know whether or not anyone has ever done this?

A. No, sir, I do not.

Q. Do you know whether or not these are published in any place that is available to the public?

A. No, sir, though some accounting firms have put out what you would call exceptions manuals, and so therefore—and some lawyers have put together some of their own thoughts of exceptions manuals that would include some of our indices and ratios, but I don't know of anything that any house or any type of publication that is out, sir. No, sir.

Q. But these are the benchmarks and criteria and standards that are normally used by your agency in the disposition of exception requests?

A. Yes, sir.

Senator MATHIAS. Now, those of us in active political life very early can find that it is not only important that the facts be as they are, that the facts be right, but the public has also got to perceive that the facts are right. And there is sometimes a very great difference between what the facts are and the public's perception of the facts. That may be the kind of problem that is developing here.

The process, the procedures, the methodology that is followed religiously by the Cost of Living Council is simply not perceived by the public to be as open as you intend it to be. But there are many, many indications that such public perception is a fact. And I think this is a serious area of concern for the Congress. None of us can ignore the atmosphere or the climate in which we are now living.

Charges are made and in some cases substantiated of favoritism, or abuse, or bias on the part of Government agencies. And obviously the opportunity for abuse or for bias is much greater if the system is closed than if it is completely open. And the only way in which I think the Cost of Living Council can continue to operate as an effective agency and you can employ your talents and those of your staff in a constructive way is with public confidence.

And that is why, I think, we are all so desperately concerned that this climate of openness should not only exist but it should be perceived to exist. And I am wondering if it would be feasible that the Cost of Living Council would only act upon standards and criteria which have been published. In other words, that standards be made public prior to adopting regulations and rulings which would be the guidelines for the future. Of course, that involves the publication of standards and criteria.

Mr. WALKER. Well, my view on that is that, in fact, our criteria are available. We operate on the basis of showing for an exception—

which I take it was the thrust of your remarks—on exception criteria based on the gross inequity and serious hardship test.

We are going to make available, and have issued, as your staff knows, regular decision lists that set out what our decisions have been. And it is my intention to see that the backup material, the detail, is published so the people have an understanding of why it was that we came down to where it was that we did on a specific issue.

It is certainly our intention to act in a manner that is consistent with the rules and the standards and the regulations that we have promulgated. The book of regulations which we have issued, which, as you know, is a somewhat formidable document, is designed to spell out, in some might say, excruciating detail, what our requirements are for the purpose of providing as much guidance as possible and for the purpose of insuring that, to the extent that it is possible given the magnitude of the task and the shortness of time, we have accommodated the legitimate interests of people who are subject to our regulations, in a manner consistent with achieving the policy objective of constraining inflation.

Senator MATHIAS. But is my assumption correct that that manual, just for one example, has not been available to the public until these hearings?

Mr. WALKER. That is correct, Senator. The IRS manual has not been available. But I am not aware that there is much in there that is at variance with the statements that are set out in our procedural regulations. There has been some amplification, I would agree.

And it has been my intention all along to have that document made public, along with the other information I have indicated to you today that it is my intention to make public.

Senator MATHIAS. And as you note, it is a monumental work.

Mr. WALKER. And it is a monumental work that is under a continual process of modification and revision.

Senator MATHIAS. But would it be a fair criticism—and I do not want to be nitpicking—but would it be a fair criticism to say of it that, although it is monumental, it is monumental in breadth rather than in depth?

Mr. WALKER. Obviously, this is a matter upon which men may express different views.

Senator MATHIAS. Well, you, who are so immersed in this whole subject, could find it a complete guide to your thinking in any given area. But to the same businessman who does not have a team of house counsel, or to the consumer who may be a complete innocent, it might be less valuable as a guide.

Mr. WALKER. Well, that, Mr. Chairman, I would suggest, is a problem which is endemic in a program of the sort that we are operating. And I do not want to dismiss your comments on that at all.

Your comments are fair, that we ought to make every effort that we can to communicate as simply and as directly and as plainly and as promptly as we can with the members of the public. And I would suggest that we are making that sort of an effort. But inevitably, in a program that is as complicated as an economic stabilization program must necessarily be, it is not going to be possible to set forth a series of rules and regulations that are readily understandable to the layman or to the small businessman who does not regularly come into contact

with the program. And that, I think, is an unhappy but a necessary condition.

Senator MATHIAS. Well, I will tell you very frankly that I do not think we can accept that limitation.

Now, when I say we, I mean you and I. I think we in the Congress, as well as you in the Cost of Living Council and the other agencies of Government that are involved, are simply going to have to try harder. And I am encouraged by your personal openness in this area and your personal willingness, I think, to try harder. And I think working together, maybe we can end up doing a better job.

Mr. WALKER. Well, we are anxious to receive your assistance, and we need all the help we can get, Senator.

Senator MATHIAS. Well, I hope we can assist. I can assure you that you will hear from us.

I thank you very much.

At this point, we will place in the record questions which we will propound in writing to the CLC and the answers, when they are received.

[The questions and answers referred to follow:]

ANSWERS TO QUESTIONS IN WRITING PROPOUNDED BY SENATOR MATHIAS TO
WILLIAM N. WALKER, GENERAL COUNSEL, COST OF LIVING COUNCIL

ECONOMIC STABILIZATION PROGRAM,

COST OF LIVING COUNCIL,

Washington, D.C., December 11, 1973.

Hon. CHARLES MCC. MATHIAS,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MATHIAS: Attached are the answers to the written questions you posed to Mr. Walker following his appearance before the Subcommittee on Separation of Powers on Wednesday, October 10, 1973, together with various requested documents. The answers to question number 3, which pertained primarily to the Internal Revenue Service, have been provided by the Service.

I hope our responses and the relating materials adequately answer your questions. Please do not hesitate to call on us if we can be of any further assistance in this matter.

Sincerely,

ROBERT BRADFORD,

Associate Director, Congressional Affairs.

Attachments.

ANSWERS TO QUESTIONS POSED TO MR. WALKER BY SENATOR MATHIAS

Question 1. In your oral testimony before the Subcommittee, you stated that you were not aware of "any other written sources of standards" which would be applied to decisions made under the Economic Stabilization Program. Please make a search of all documents and written material in the Council or in the hands of IRS to determine whether there are any additional such standards, in whatever form. Please supply them to the Subcommittee. If these do not exist, would you agree that they should? What attempts are being made to develop more definitive standards and guidelines for public use? Would you be willing to supply updated material and make such material available to the public at the same time it is made available internally within CLC and IRS?

Answer. There are no other written sources of standards other than those cited in Mr. Walker's testimony. However, there are included within the recently proposed Health Care regulations (38 F.R. 30850, November 7, 1973) statements of the factors which the Council will consider in reviewing exception requests from medical practitioners (proposed § 150.513), acute care hospitals (proposed § 150.523), and long term care hospitals (proposed § 150.534). As the stabilization Program evolves to meet changing economic conditions, the Council will formalize and make public any additional criteria which might emerge from case-by-case decisions with respect to any particular area of the program.

Further, the IRS has developed procedures to issue page changes to the IRS Phase IV Guidebook on a weekly basis. Thus, revisions in operating procedures, processing and analytical criteria will be readily available on a systematic basis.

Question 2. Under each Phase of the Economic Stabilization Program, where applicable, how many exception requests were sought? How many granted? How many denied? How many pending?

Answer. The table below indicates the number of exceptions received, granted and denied for each of the Phases of the Economic Stabilization Program.

The exceptions listed below are divided among the Phases according to the date of receipt although the regulations for certain sectors, such as food and health, were continued unchanged through several Phases. "Pending" figures are provided only for Phase IV. All pending requests from prior Phases have been disposed of or are accounted for in the figures for Phase IV. The total of exceptions received is greater than the total of exceptions granted, denied or pending due to three factors: first, because of interagency transfers of exceptions requests, approximately 6,000 requests were counted twice; second, changes in the regulatory system, from one phase to another, rendered many requests moot; and third, many exception requests did not in fact require treatment as such as the relief requested was provided for in the regulations or the exception request required only on interpretation of certain regulations.

EXCEPTIONS

	Received	Granted ¹	Denied	Pending
Phase I: OEP.....	4,786	5	3,230	-----
Phase II:				
IRS.....	35,387	3,564	6,728	-----
PC.....	2,987	583	910	-----
Phase III:				
IRS.....	2,805	487	196	-----
CLC.....	1,168	301	397	-----
Freeze II: CLC.....	1,245	113	524	-----
Phase IV:				
CLC.....	2,089	333	439	967
IRS.....	1,383	71	441	441

¹ Granted in whole or in part.

Question 3. What is the impact of the Economic Stabilization Program on the Internal Revenue Service? Please identify any communications between CLC and IRS or any other reports which deal with the impact of the program on IRS. What percentage of total IRS agents does the 3000 assigned to CLC represent? Has this resulted in any impairment of tax collection and other normal IRS functions? To what extent is taxpayer information submitted to IRS used for ESP purposes? To what extent is information submitted to IRS for ESP purposes used for tax purposes?

Answer. What is the impact of the Economic Stabilization Program on IRS services?

When President Nixon announced establishment of the Economic Stabilization Program in August, 1971, he also announced his intention to require 5% reduction in the Federal work force which was to be applied to virtually all agencies. However, it was decided by the Office of Management and Budget that the Revenue Service would be exempt from the 5% cut and that the equivalent of 3,000 IRS positions, which would have been involved in the cut, would instead provide the work force for Revenue's administration of the Stabilization Program. The positions being used by the Stabilization Program, therefore, would not have been available for tax administration work in any event.

When the Economic Stabilization Program is terminated, of course, the Stabilization employees will be re-integrated into the tax administration functions of IRS.

While IRS costs for this Program were previously covered within the IRS appropriation, those funds are removed from the Service's FY 1974 budget and are now separately funded by the Cost of Living Council's FY 1974 appropriation.

Please identify any communications between Cost of Living Council and IRS or any other reports which deal with the impact of the Program on IRS.

The impact of the Stabilization Program on the Revenue Service's tax administration activities has not been a subject of communications between the Revenue Service and the Cost of Living Council.

What percentage of total IRS Agents does the 3,000 assigned to the Cost of Living Council represent?

The Internal Revenue Service employs 2,800 people for the Economic Stabilization Program. Of that total, 1,400 including 320 new hires without previous IRS experience, are Revenue Agents who are trained in accounting and investigations. These revenue agents consider requests for exceptions and appeals and apply technical interpretations of the Stabilization regulations in accordance with Cost of Living Council policies. The other 1,400 Stabilization employees are from a variety of job classifications. They perform less complex investigations, answer public inquires and complaints, and provide managerial and clerical support. The Revenue Agents employed in Stabilization represent 10% of the approximately 14,000 Revenue Agents in the Internal Revenue Service.

Has this resulted in any impairment of tax collection and other normal IRS functions?

Only to the extent outlined in the answer to Question 1.

To what extent is taxpayer information submitted to IRS used for Economic Stabilization Program purposes?

Section 301.6103(a)-109 of Title 26, Code of Federal Regulations authorizes the inspection of tax returns for Stabilization purposes by IRS employees.

§ 301.6103(a)-109 Inspection of returns by Department of the Treasury for economic stabilization purposes.

(a) In general. Officers and employees of the Department of the Treasury, including the Internal Revenue Service and the Office of Chief Counsel for the Internal Revenue Service, whose official duties include the administration or enforcement of provisions of the Economic Stabilization Act of 1970 (Public Law 91-379, 84 Stat. 799), as amended by the Economic Stabilization Act Amendments of 1971 (Public Law 92-210, 85 Stat. 743), may inspect any returns made in respect of any tax described in paragraph (a)(2) of § 301.6103(a)-1 without making written application therefor. The provisions of paragraph (e) of § 301.6103(a)-1 shall not apply with respect to the head of a bureau or office in the Department of the Treasury, including the Internal Revenue Service and the Office of Chief Counsel for the Internal Revenue Service, who desires to inspect, or to have an employee of his bureau or office inspect, any such return in connection with some matter officially before him for the purpose of administering or enforcing the provisions of the Economic Stabilization Act of 1970, as amended. The information obtained from inspection pursuant to this paragraph may be—

(i) Used as evidence by the Department of the Treasury, including the Internal Revenue Service and the Office of Chief Counsel for the Internal Revenue Service, in any proceeding, conducted by or before any department or establishment of the United States, or to which the United States is a party, or

(ii) Used to the extent necessary to effectuate the purposes for which such returns are open to inspection.

(b) Terms used—(1) "Return". For the definition of the term "return" for purposes of section 6103(a) and this section, see paragraph (a)(3)(i) of § 301.6103(a)-1.

(2) Other terms. Any word or term used in this section, other than the word "return", which is defined in any chapter of the Code shall be given the definition contained in the chapter which is applicable to the particular return made.

Although this authority exists, it is used rarely.

To what extent is information submitted to IRS for Economic Stabilization Program purposes used for tax purposes?

Section 401.1001 of Title 6, Code of Federal Regulations, authorizes the inspection of Stabilization records by IRS employees for tax purposes.

§ 401.1001 Inspection of Internal Revenue Service stabilization records by Department of the Treasury and Department of Justice.

(a) In general. Pursuant to the provisions of section 205 of the Economic Stabilization Act of 1970 (Public Law 91-379, 84 Stat. 799), as amended by the Economic Stabilization Act Amendment of 1971 (Public Law 92-210, 85 Stat. 747), officers and employees of the Department of the Treasury (including the Internal Revenue Service) and the Department of Justice whose official duties require inspection of returns made in respect of any tax described in paragraph (a)(2) of 301.6103(a)-1 of 26 CFR Part 301, or include the administration or enforcement of the provisions of the Economic Stabilization Act of 1970, as amended may inspect the stabilization records of the Internal Revenue Service without

making written application therefor. If the head of a bureau or office in the Department of the Treasury (not a part of the Internal Revenue Service or the Office of Chief Counsel for the Internal Revenue Service), or the Department of Justice, desires to inspect, or to have an employee of his bureau or office inspect, any such records in connection with some matter officially before him for reasons other than tax administration purposes or the administration or enforcement of the provision of the Economic Stabilization Act of 1970, as amended, the inspection may, in the discretion of the Secretary of the Treasury or the Commissioner of Internal Revenue or the delegate of either, be permitted upon written application by the head of the bureau or office desiring the inspection. The application shall be made to the Commissioner of Internal Revenue, Washington, D.C. 20224, and shall show the name and address of the person about whom records are to be inspected and the reason why inspection is desired. The information obtained from inspection pursuant to this paragraph may be used as evidence in any proceeding conducted by or before any department or establishment of the United States, or to which the United States is a party.

(b) Definitions of terms—(1) Stabilization records. For purposes of this section, the term “stabilization records” includes—

- (i) All schedules, lists, written statements, or other written documents filed by or on behalf of any person with the Internal Revenue Service, and
- (ii) All other reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to any person and held by the Internal Revenue Service. . . .

This authority also is rarely used.

Question 4. What are the time limits within which requests for exceptions must be processed? How much discretion do Cost of Living Council or IRS officials have with regard to the time by which they must make decisions on requests for exceptions? Does a deliberate policy of delay play a role in the timing of Council action on exception requests and other actions? How much of a role should it play? Do you have any priority classifications for IRS or are they handled on a first-come-first-served basis? Do you have any procedures to prevent the use of exception requests to provide leverage against a party in an unrelated dispute? How long have exception requests taken to process to decision (initial and reconsideration) under each phase? On the average? What percentage took longer than 60 days?

Answer. There are no specific time limits within which the Council or the Internal Revenue Service must process requests for exception. Each Council office with substantive responsibility (i.e., Office of Wage Stabilization, Office of Price Stabilization, Office of Food, and Office of Health) and the IRS are expected to process exception requests within their respective areas as quickly as possible; otherwise they have full discretion with regard to time for making decisions on those requests. Although it varies from office-to-office, 30 days for processing an exception request is a generally recognized target. The Council does not have a policy of deliberate delay in the process of exception requests or any other actions. Exception requests are for the most part handled on a first-come-first-served basis. Occasionally priority treatment is given to particularly urgent cases (e.g., imminent bankruptcy, plant closing, forced removal of a product from the market place).

PRICE EXCEPTION REQUESTS PROCESSING TIME

	General industries		Health services		Food Industry	
	Average time, days	Percent over 60 days	Average time, days	Percent over 60 days	Average time, days	Percent over 60 days
Phase II.....	33	40	31.5	18	33	52
Phase III.....	NA	NA	38	33	25	?
Freeze.....	13	44	NA	NA	13	0
Phase IV.....	23	11	29	18	15	0
Phase IV (petroleum products).....	(1)	2				

¹ Because of changes in petroleum regulations which mooted numerous exception requests, computed average processing time is meaningless.

Question 5. To what extent does the Cost of Living Council rely upon outside consulting advice? Please provide a list of those people who have been used as consultants by the Cost of Living Council (individuals and companies), their area of expertise, the projects to which they were assigned, and the remuneration they have received?

Answer. In general, the Cost of Living Council uses outside consultants to obtain specialized information or services and where it is more cost effective either because the availability of needed expertise is limited or because the need does not justify the addition of a staff member to the Cost of Living Council.

The following two charts indicate the contracts consultants and individual consultants used by the Cost of Living Council.

OUTSIDE CONSULTANTS AND EXPERTS EMPLOYED BY COLC ON INTERMITTENT BASIS; NOV. 26, 1973

Name	Area of expertise	Projects	Annual rate	Paid per day
B. Allen Benn	Operations research, cost analysis.	Forward impact analysis.	\$36,000	\$138.48
Paul Broughton	Hospital finance.	Developing phase 4 hospital administration manual.	26,189	100.72
Donald M. Cagle	Economics, union activities.	Serves as member of Pay Board cases and appeals panel; makes recommendations as regarding phase 2 cases.	26,898	103.44
William G. Caples	Labor-management activities.	Advises CLC Director on difficult labor/management situations. Analysis of complex cases.	36,000	138.48
Millard Cass	Labor.	Serves as counselor to the CLC Director; advises on pay adjustments for public sector employees. Also is Administrator for Pay Board matters.	36,000	138.48
T. S. Chidambaram	Statistical analysis, modeling, simulation.	Preliminary design of an impact analysis of phase 4 on the U.S. economy.	27,479	105.69
Malcolm S. Cohen	Development of cost data for computerizing wage rate data.	Develop a wage information system.	36,000	138.48
Martin Feldstein	Economic analysis health services.	Development of new health regulations.	36,000	138.48
John Ferris	Agricultural economics.	Studies on Agriculture, food prices, and the food industry.	27,795	106.85
Joseph G. Foy	Food distribution.	Maintains liaison between CLC and the food industry; works on program activities with the IRS.	28,263	108.72
Ronald W. Haughton	Management, labor, and industrial relations.	Advises CLC Director on difficult labor/management situations. Analysis of complex cases.	36,000	138.48
Marvin Hayenza	Forecasting supplies and prices of livestock products.	Forecasts on supplies and prices of eggs, poultry, beef, etc.	23,088	88.80
Dale Heien	Application of computer technology to the analysis of price trends.	Analyze price trends in major economic sector and develop technical approaches for assessing the causes of these trends.	35,363	136.00
Woodrow R. Jacobson	Executive compensation.	Advises CLC Director on difficult labor/management situations. Analysis of complex cases.	36,000	138.48
Matthew A. Kelly	Labor law.	Serves as member of Pay Board cases and appeals panel. Makes recommendations regarding phase 2 cases.	36,000	138.48
Henry E. Larzelere	Economic forecasting.	Forecasting livestock prices.	24,247	93.28
Wilbur G. Lewellen	Industrial management; business finance.	Advises CLC Director on difficult labor/management situations. Analysis of complex cases.	36,000	138.48
Wesley R. Liebttag	Corporate compensation.	do.	WOC	
Edward A. Markowitz	Data processing.	Development of computer information system and reporting disclosure system for contract construction.	20,677	79.52
Edward J. McCamley	Management and program analysis.	Makes feasibility studies, evaluations and guidance in improving operations.	29,095	111.92
Herbert Messer	Compensation, salary administration.	Advises CLC Director on difficult labor/management situations. Analysis of complex cases.	WOC	
Ronald L. Miller	Management, arbitration, employee grievances.	Advises CLC Director on difficult labor/management situations. Analysis of complex cases.	36,000	138.48
D. Quinn Mills	Economic policy and program formulation.	Advises CLC Director on various aspects of the total E.S.P.	36,000	138.48
Daniel I. Padberg	Agricultural economics, food retailing.	Food Advisory Committee; assists on decontrol of food industry.	31,089	119.60
Peter J. Pestillo	Industrial relations.	Serves as member of Pay Board cases and appeals panel; makes recommendations regarding phase 2 cases.	36,000	138.48

OUTSIDE CONSULTANTS AND EXPERTS EMPLOYED BY COLC ON INTERMITTENT BASIS; NOV. 26, 1973—Continued

Name	Area of expertise	Projects	Annual rate	Paid per day
Franklin Satterthweite	Field research for Ph. D. on history of Price Commission.	Assists historian in gathering historical material on economic stabilization program.	20,677	79.52
Stuart G. Schmidt	Economics: Price and monetary theory, public finance.	Continuation of analysis to develop and refine phase 4 nursing home system. Analysis of trends in capital financing of hospitals.	26,168	100.64
Ralph T. Seward	Labor arbitration	do	36,000	138.48
William E. Simkin	do	do	36,000	138.48
Jack Stieber	Economics: Labor and industrial relations.	do	36,000	138.48
L. Reed Tripp	Economics: Industrial relations, wage stabilization.	Advises CLC Director and Administrator of the Office of Wage Stabilization on difficult labor/management situations.	36,000	138.48
Charles L. Trozzo	Economics: Industrial organization, program analysis.	Conducts study of ways to adjust OEP stockpile sales and purchases which influence overall price patterns for strategic commodities.	34,971	134.48
Martin Wertlieb	Compensation	Advises CLC Director on executive compensation.	30,018	115.44
Donald J. White	Economics: Industrial relations, labor arbitration.	Advises CLC Director on wage and salary matters in the construction industry.	36,000	138.48
Chester L. Wilhelm	Salary administration	Advises CLC Director on difficult labor/management situations. Analysis of complex cases.	36,000	138.48

COST OF LIVING COUNCIL FISCAL YEAR 1973 AND FISCAL YEAR 1974 CONTRACTS

Contract No.	Contractor	Obligated dollars	Description of work
CLC-73-1	Dynamics Associates, Inc.	\$95,000	Systems design/analysis.
CLC-73-2	Peat, Marwick, Mitchell & Co.	28,840	Accounting services.
CLC-73-3	The Rand Corp.	120,000	Research, analysis and evaluation services.
CLC-73-4	Touche Ross & Co.	230,012	Accounting services.
CLC-73-5	Ernst & Ernst	19,700	Do.
CLC-73-6	Leasco Information Products	16,280	Microfiche copies of SEC filings.
CLC-73-7	Sterling Institute	9,924	Update, revise training aids.
CLC-73-8	Data Resources, Inc.	60,000	Analytical software services.
CLC-73-9	On-Line Systems, Inc.	391,700	Programming.
CLC-73-10	On-Line Systems, Inc.	995,000	Do.
CLC-73-11	Lissner & Prindle	25,814	Filmstrips and packaging for public information materials.
CLC-73-12	Haskins & Sells	18,000	Develop computer audit program for compliance reviews.
CLC-73-13	L. G. Balfour Co.	3,300	Medallions.
CLC-73-14	(No contract awarded)		
CLC-73-15	(No contract awarded)		
CLC-73-16	Seidman & Seidman	16,450	Accounting study and report.
CLC-73-17	National Association of Home Builders.	65,955	Breakout of CICS data base.
CLC-73-18	Rutgers University	5,800	Rent control seminar.
CLC-73-19	(No contract awarded)		
CLC-73-20	L. G. Balfour Co.	3,000	Medallions.
CLC-73-21	Press Intelligence	5,500	Newsclipping service.
CLC-73-22	Investors Management Sciences, Inc.	13,500	Lease of Compusat financial data base.
CLC-73-23	Battelle, Columbus Laboratories	430,000	Information analysis services.
CLC-73-24	Stanford Research Institute	400,000	Research and analysis services.
CLC-73-25	On-Line Systems, Inc.	1,989,000	Programming.
CLC-73-26	McKinsey & Co.	42,500	Management study and report.
CLC-73-27	Interactive Data Corp.	30,000	Time-sharing computer services; proprietary data bases.
CLC-73-28	Burnaford & Co., Inc.	56,000	Education kits.
CLC-73-29	Economic Information System, Inc.	15,000	Lease of economic data base.
CLC-73-30	Leasco Information Products, Inc.	5,600	Microfiche of SEC business reports.
CLC-73-31	Data Resources, Inc.	60,000	Analytical software services.
CLC-73-32	Dynamics Associates	60,000	Programming, systems design/analysis.
C740001	Kwik Kall Communications	3,655	Lease of electronic pagers.
C740002	The Interindustry Economics Research Fund.	7,500	Computer services and technical consultation.
C740003	GTE Information Systems, Inc.	77,500	Lease of ADP peripheral equipment.
C740004	American Management System	40,000	Systems design analysis and programming services.
C740005	Advertising Distributors of Maryland, Inc.	11,250	Mass mailing of CLC forms.

COST OF LIVING COUNCIL FISCAL YEAR 1973 AND FISCAL YEAR 1974 CONTRACTS—Continued

Contract No.	Contractor	Obligated dollars	Description of work
C740006.....	Coopers & Lybrand.....	14,900	Specialized auditing/compliance monitoring services.
C740007.....	Dun & Bradstreet, Inc.....	5,500	Construction industry marketing data.
C740008.....	Lundberg Survey, Inc.....	4,653	Petroleum industry marketing data.
C740009.....	University of Michigan/Wayne State..	46,000	Develop occupational wage data system for selected industries.
C740010.....	IMS America, Ltd.....	5,800	Analyses of medical supply item prices.

Question 6. What security measures have you taken to protect confidential information in your possession? Have you had any problems with the security of such information? If so, please describe them.

Answer. Confidential information in the Cost of Living Council's possession is protected by comprehensive security measures. The building which houses the Cost of Living Council is guarded at all entrances by the Federal Protective Service. Cost of Living Council employees must show their picture identification cards each time they enter and on weekends and after hours additionally must sign in and sign out. Visitors must always identify themselves, receive a visitors pass, and sign in and out.

Access to files is restricted to Cost of Living Council personnel. Files which contain confidential information are stamped accordingly and are kept in locked safes, file cabinets, or desk cabinets except when Cost of Living Council personnel are actually using them.

Submissions containing confidential information from the Internal Revenue Service to the Cost of Living Council are sent by "Certified Mail," and are logged in Cost of Living Council Registers and assigned to Council analysts by name and signature.

In addition many precautions have been taken to protect and preserve the integrity of confidential information stored on computer files. For example, files are protected through limited user access and further by several levels of password controls which must be used before the data can be obtained. Further, an hourly reading is taken and monitored to ascertain users currently on the system as a check on who is actually accessing what data files.

The Cost of Living Council is unaware of any problems with respect to the security of confidential information.

Question 7. Describe your arrangements with private industry (such as Commerce Clearinghouse) designed to assist you in getting information to the public? Please provide a copy of any contracts or agreements of this nature? In your testimony, you indicated that CCH will publish your exceptions decisions. When will this begin? How much additional information concerning those cases compared with that which is now publicly available will be supplied? Will this information provide sufficient details concerning the finding of fact and conclusion of law so that they will be useful for legal precedent and will you accept them for such purposes?

Answer. The Cost of Living Council normally handles its public information activities internally. It maintains a mailing list of approximately 2800 members of the public who receive all press releases (approximately 470 since Phase II). Further, another list, containing approximately 10,000 names, is maintained for special publications such as "Freeze Facts," "The Freeze and Phase IV," "Phase IV Announcement," etc.

In early 1971, to assist in the administration of the program, the Internal Revenue Service entered into an agreement with Commerce Clearinghouse to publish all official stabilization materials in a loose leaf binder service. These materials include the Economic Stabilization Act, executive orders and regulations promulgated pursuant thereto, policy statements, question and answers, and rulings, and are updated weekly or more frequently as needed. The Stabilization Program Guidelines are available to all persons involved in the administration of the stabilization program. In fiscal 1973, the publication of these materials by CCH cost the Internal Revenue Service approximately \$82,000.

Additionally, Commerce Clearinghouse publishes its own loose leaf binder service entitled "Economic Controls," which is substantially the same as the Stabilization Program Guidelines. The Bureau of National Affairs also publishes these materials in a binder service known as "Federal Controls."

The Cost of Living Council has also concluded informal arrangements with Commerce Clearinghouse to publish its exception decisions. Publication of these

decisions, which began on November 2, 1973, (see attachments), substantially increases the amount of information in the public domain by making available the Council's Decisions and Orders rather than digests thereof. These decisions and orders will have precedential value with respect to any request which is founded upon the same factual basis, and will otherwise provide an additional body of guidance for requests with similar factual bases.

PHASE IV PRICE INCREASE APPROVALS AND DENIALS

APPROVALS

FMC Corporation—Chicago, Illinois—Nonelectrical Machinery and Chemicals— Exception Request Granted

On August 17, 1973, FMC Corporation ("FMC") filed a request for an exception from the provisions of Subparts E and H of the Phase IV Economic Stabilization Regulations. That exception request, if granted, would permit FMC to raise the price of rayon tire cord from 56 cents per pound to 61 cents per pound without reference to the cost justification and prenotification requirements set forth in the Economic Stabilization Regulations.

The Cost of Living Council, having considered such application for exception, has concluded that:

(a) In March, 1973, FMC informed its major buyers of rayon tire cord that it was terminating the production of rayon tire cord and converting its production facilities to the manufacture of rayon staple products.

(b) Subsequently, FMC's major purchasers of rayon tire cord urgently requested that FMC continue producing and supplying them with rayon tire cord.

(c) FMC's continued production of rayon tire cord is necessary in order to ensure an adequate supply of tires in the domestic American market.

(d) In order to induce FMC to continue to produce rayon tire cord, FMC's major purchasers negotiated contracts with FMC. Under the terms of these contracts, FMC's purchasers would be obligated to purchase specified quantities of rayon tire cord from FMC at a price of 61 cents per pound. These contracts were not entered into with a view towards evading, avoiding or undermining the application of the Economic Stabilization Program to FMC or its major purchasers.

(e) These contracts were not formalized prior to the June 13, 1973, announcement of the General Price Freeze.

(f) Under Phase IV Regulations, FMC's base price for rayon tire cord is 56 cents per pound.

(g) A price increase of 5 cents per pound in the price of rayon tire cord could not be cost justified under the provisions of 6 CFR, Subpart E.

(h) FMC accounts for over 40 percent of the domestic production of rayon tire cord. It is one of the two major producers accounting for approximately 90 percent of the total U.S. production of rayon tire cord.

(i) On June 7, 1973, FMC's major competitor increased its price for rayon tire cord from 56 cents per pound to 61 cents per pound.

(j) Rayon tire cord is currently in short supply as are the acceptable substitutes for rayon tire cord.

(k) Because of the historically declining nature of the market for rayon tire cord, no new capital investment in rayon tire capacity is anticipated.

(l) If FMC is not permitted to raise its price for rayon tire cord from 56 cents per pound to 61 cents per pound, it will terminate its production of rayon tire cord and convert its production facilities to other uses.

(m) The withdrawal of FMC from the production of rayon tire cord would eliminate over 40 percent of domestic production of this commodity and result in shortages and market distortions.

(n) Based on the considerations stated above, and the data submitted by FMC in support of its exception application, the application of 6 CFR, Subparts E and H to FMC's rayon tire cord operation results in a gross inequity.

It is therefore ordered that:

(1) FMC's request for exception from the provisions of 6 CFR Subparts E and H be and is granted as set forth below.

(2) FMC Corporation is hereby allowed to increase the price of the rayon tire cord which it supplies to the rubber industry from 56 cents to 61 cents per pound without regard to the provisions of Subparts E and H of the Economic Stabilization Regulations.

(3) The provisions of paragraph (2) above to FMC in no way alters the application of the profit margin limitations as set forth in the Economic Stabilization Regulations to FMC.

Twin Disc, Incorporated—Racine, Wisconsin—Power Transmission Equipment—Exception Request Granted

The Cost of Living Council, having considered the application for exception submitted by Twin Disc, Inc. has concluded that:

(a) Under the provisions of 6 C.F.R. 150.102, Twin Disc's base prices with respect to sales or leases of items is the average price at which the item was lawfully priced in transactions with the class of purchaser concerned during the base price period. The base price period is defined in 6 C.F.R. 150.102(c) as the last fiscal quarter which ended before January 11, 1973.

(b) Twin Disc's last fiscal quarter which ended before January 11, 1973, is its fiscal quarter which began on October 1, 1972, and ended on December 31, 1972.

(c) On November 1, 1972, Twin Disc commenced a voluntary compliance plan as a result of its having exceeded its base period profit margin for its fiscal year ended June 30, 1972.

(d) As part of its voluntary reduction plan, Twin Disc reduced all prices to Phase II base price levels from the period commencing on November 1, 1972, and ending on June 30, 1973. Approximately 67% of Twin Disc's sales during its last fiscal quarter which ended prior to January 11, 1973, were made during the period November 1, 1972, through December 31, 1972. Consequently a very substantial portion of the sales used to calculate Twin Disc's Phase IV base prices were sales made at Phase II base price levels.

(e) As a result of the above facts, Twin Disc's Phase IV base price levels are significantly lower than the price levels which were cost justified prior to the date of its voluntary price remission plan and Twin Disc's operating income level has, as a direct consequence, significantly declined to the present time.

(f) The continued application of the provisions of 6 C.F.R. 150.102 to Twin Disc would seriously disrupt its normal business practices, seriously contract its available working capital, adversely affect in a significant manner capital expansion plans, and result in significant shortages of important items produced by Twin Disc.

(g) Based on the considerations stated above, and the data submitted by Twin Disc in support of its exception application, the application of 6 C.F.R. 150.102 to Twin Disc results in a gross inequity.

It is therefore ordered that:

(1) Twin Disc's request for an exception from the provisions of 6 C.F.R. 150.102 be and is granted as set forth below.

(2) The Phase IV base price period as set forth in 6 C.F.R. 102(c) shall, as applied to Twin Disc, be the month beginning on October 1, 1972, and ending on October 31, 1972.

DENIALS

American Motors Corporation—Detroit, Michigan—Automobiles—Exception Request Denied

The Cost of Living Council having considered your prenotification for a price increase of 2.17%, or an average of \$61.00 per equipped 1974 model passenger and commercial vehicle, hereby modifies the proposed price increase and defers a portion of it pursuant to 6 CFR § 150.154 as follows:

An average price increase of 1.96%, which averages to \$55.00 per equipped vehicle, may be put into effect beginning September 13, 1973. This portion of the proposed price increase represents a dollar-for-dollar pass through of Federally mandated bumper and safety equipment costs for all 1974 model vehicles. This increase is applicable to both the wholesale price and to the manufacturer's suggested retail price.

Your request for an *exception* to the 30-day prenotification requirement is denied. However, since the price increase is applicable to all 1974 model vehicles, American Motors Corporation may rebill its dealers to recover these costs on 1974 model vehicles that have been shipped to dealers prior to September 13, 1973 and billed at tentative prices.

Costs related to certain items of overhead (an average of \$6.00 per vehicle) are deferred on the basis of a finding by the Council that the portion of the proposed price increase for the reason stated below is of such magnitude and would have

such an impact upon the economy as to be unreasonably inconsistent with the goals of the Economic Stabilization Program. While this portion of the increase, in and of itself, is not of great magnitude it must be viewed in light of the fact that American Motors Corporation has indicated that it may propose additional price increases at a later date based upon other factors relating to economic costs. In view of this larger context, the Council has concluded that the objectives of the Economic Stabilization Program require proposed price increases other than those for Federally mandated bumper and safety equipment on 1974 model vehicles to be reviewed together and not on an incremental basis. Consequently, the Council's deferral of these proposed price increases at this time is without prejudice to their resubmission at a later date in support of future proposed price increases.

The proposed price increases set forth in paragraph 1 of this Order may be put into effect notwithstanding the provisions of § 150.11 of the regulations of the Economic Stabilization Program on the basis of the Council's determination that denial of these increases to American Motors on the basis of that provision would impose a severe hardship or gross inequity.

Within 30 days after the date it begins implementing the price increase set out in paragraphs 1 of this Order, American Motors Corporation is directed to furnish the Cost of Living Council with a report showing the percent and dollar amount of price increase implemented on each 1974 model vehicle over and above the comparable 1973 model vehicle price together with a description of the company's overall price monitoring plan to assure that the price increases will be applied in compliance with the provisions of § 150.74 of the regulations of the Economic Stabilization Program.

Martin Marietta Corporation—New York, N.Y.—Aluminum—Exception Request Denied

On August 31, 1973, the Martin Marietta Corporation applied for an exception on behalf of its subsidiary Martin Marietta Aluminum ("MMA"). The exception request if granted would permit MMA to establish price levels for aluminum mill products as a function of the operating capacity of its aluminum reduction plants. The operating capacity of such plants is dependent on the power allocated to it by the Bonneville Power Administration.

The Cost of Living Council, having considered such application for exception has concluded that:

(a) Since April of 1973, the Bonneville Power Administration has reduced the power allocated by it to MMA's aluminum reduction plants. This reduction in power allocation is expected to continue until the Spring of 1974.

(b) As a consequence of such reduction in power allocation, the output of MMA's aluminum reduction plants has declined resulting in a greater per unit cost of primary aluminum produced by such plants.

(c) The action taken by the Bonneville Power Administration in reducing power allocation to MMA's plants was a result of a decrease in electrical power generally available in the Northwestern United States as a consequence of substantially below normal levels of rainfall and snowpack.

(d) The increase in per unit output cost incurred by MMA as a result of volume decreases is not a basis for cost justifying price increases since the firm's customary accounting data can reasonably be used to determine input cost rates. Such input cost rates have not increased.

(e) The reduction in electrical power allocated to MMA's aluminum reduction plants and the increase in per unit output costs of primary aluminum is not attributable to the operation of the Economic Stabilization Program.

(f) The difficulty which MMA is incurring in obtaining additional supplies of primary aluminum from sources other than its own reduction plants is also not attributable to the operation of the Economic Stabilization Program.

(g) The electrical power shortage experienced in the Northwestern United States has had a greater impact on MMA than on other major aluminum producers since MMA is the only U.S. producer with 100% of its primary aluminum capacity located in that part of the United States. This effect however is not attributable to the operation of the Economic Stabilization Program.

(h) Financial and other data submitted by Martin Marietta Corporation and MMA have failed to demonstrate that a serious hardship will be incurred as a result of the operation of the Economic Stabilization Program.

(i) Based on the considerations stated above, and the data submitted by Martin Marietta Corporation and its subsidiary Martin Marietta Aluminum in

support of their exception request, the application of 6 CFR Part 150 does not result in a serious hardship or gross inequity.

It is therefore ordered that :

Martin Marietta Corporation's request for an exception from the provisions of 6 CFR Part 150, made on behalf of its subsidiary Martin Marietta Aluminum, be and is denied.

Question 8. What are the differences between an exception and an exemption? Are both granted under the authority of Sec. 203(b) (2) of the Act? What requirements may be imposed on a party who has received an exception? An exemption? Has the Council embarked on a policy of using the exemption process to phase out controls? What are the criteria governing the granting of exemptions? Do manuals or other forms of guidelines exist for the exemptions process? If so, please provide them. If not, why not?

Answer. Throughout the history of the Economic Stabilization Act, there have been, and in Phase IV there continue to be, major differences between exceptions and exemptions. An exception, which may be granted either to individuals or to a group of individuals similarly situated, provides relief from particular rules, regulations or orders or parts thereof issued pursuant to the Act while continuing the individual or group under the regulatory system. (See 6 CFR 155.2.) An exemption, however, generally applies to an industry or to a unit thereof, and removes the industry or unit from the regulatory system of the Economic Stabilization Program (see 6 CFR 155.2).

The authority to grant exceptions and exemptions derives from several sources. Section 203(b) (2) of the Act specifically provides "for the making of such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits . . ." Further, Section 207(b) provides that "[a]ny agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, or seeking an exception or exemption from, such rules, regulations, and orders." Finally, inherent in the authority to regulate the economy, prescribed in the Economic Stabilization Act, is the authority not to regulate to achieve the purposes of the Act.

Authority to grant exemptions is also derived from the legislative history of the Economic Stabilization Act. As originally approved on August 15, 1970, section 202 of the Act (now section 203) provided as follows :

"The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for making of such adjustments as may be necessary to prevent gross inequities."

Pursuant to this authority, the President in March 1971 promulgated Executive Order 11588 providing for the establishment of wage and price controls in the construction industry. In May of 1971, the Economic Stabilization Act was amended by the addition of a new paragraph to Section 202 which provided as follows :

"(b) The authority conferred on the President by this section shall not be exercised with respect to a particular industry or a segment of the economy unless the President determines, after taking into account the seasonal nature of employment, the rate of employment or underemployment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally."

When the Administration sought extension of the Economic Stabilization Act in October of 1971, it requested that this provision be deleted on the grounds that it arguably would constitute a bar to selective decontrol. Secretary Connally testified before the House Committee on Banking and Currency as follows :

"Inasmuch as this provision might hamper the efforts of the Price Commission and Pay Board systematically to dismantle the control system, as appropriate, we suggest deletion of this restriction."

Under Secretary Walker testified to the same effect before the Senate Committee on Banking, Housing and Urban Affairs. The provision was deleted from the statute.

There are generally no special requirements imposed on parties who receive an exception. In the health sector, however, a party receiving an exception must

fulfill certain reporting requirements. Further, there are no requirements imposed pursuant to an exemption. In several cases, however, such as the fertilizer industry, an industry receiving an exemption will make commitments to undertake certain actions considered desirable by the Cost of Living Council. Thus, when the Council exempted the sale of fertilizer from Phase IV controls (October 25, 1973), the fertilizer companies indicated that they would substantially increase the number of tons sold domestically and take other actions to help alleviate the current tight supply situation.

The exemption process has been used to phase out controls consistent with the Council's policy to regulate only those sectors of the economy which require controls in order to effectuate the purposes of the Act. The criteria for granting exemptions necessarily vary from industry to industry or part thereof. The overall standard for granting an exemption is, of course, that the exemption will either contribute to the achievement of Economic Stabilization goals or that it will not adversely affect the achievement of these goals. When an exemption is under study, the Council considers what impact decontrol would have on the economy. It examines past quarterly reports to gain insight into cost and price behavior. It also looks to future projections of price and cost performance.

Due to the tremendous variety of factors to be considered and to the evolving nature of the exemption process, there are presently no manuals or written guidelines.

Question 9. What are the criteria used for exempting the fertilizer industry? Will those standards be applied to other industries? What requirements were placed on the fertilizer industry in connection with its exemptions?

Answer. Worldwide emphasis on improving agricultural output has placed considerable demand on supplies of U.S. fertilizer. Consequently, world prices for a number of major fertilizer materials rose substantially above levels that domestic producers could justify. Accordingly, producers were able to turn to foreign markets and earn substantially larger profits than from selling to domestic customers. In the first half of 1973, exports of anhydrous ammonia and ammonia phosphate fertilizers were up 54 percent and 34 percent respectively from year earlier levels. At the same time that exports were increasing, the Administration announced a goal of significantly expanding agricultural output in order to stabilize food prices in 1974. If the two tier market pricing system had been allowed to continue, net supplies of nitrogen for U.S. farm use would, it has been estimated by USDA, have fallen 10 percent short of requirements in 1973/74. The phosphate shortage has been estimated at 12 percent. The Council's action in removing the fertilizer industry from controls is consistent with the Administration's goal of significantly expanding crop output in 1974.

It is difficult to say categorically whether the same criteria used to remove controls from fertilizers will be applied to other industries. While other sectors of the economy could conceivably be experiencing problems similar to that in the fertilizer industry, it is likely that the economic circumstances surrounding other industries will require different criteria for the removal of controls. Because of the diverse nature of American economy, individual industries will have to be treated with criteria tailored to specific problems.

In conjunction with the exemption for the fertilizer industry, two groups were established—one made up of industry representatives, and the other an inter-agency panel—to focus on ways to stimulate supplies of fertilizer available to U.S. farmers and to divert exports to domestic markets. Specifically, the supply expansion program will concern itself with the continued operation of marginally profitable plants, the reopening of closed plants, faster construction of new production facilities, the establishment of an export monitoring system, efforts to raise the priorities for natural gas feed stocks for ammonia producers, working with the Department of Transportation to eliminate shipping bottlenecks and to improve rail car and transportation availability, development of a regular price monitoring system, and continued work with industry representatives to seek additional opportunities to ensure the availability of fertilizer to U.S. farmers.

Question 10. CLC Bulletin 371 (August 23, 1973) announced the formation of a committee of senior government officials to develop a policy on exceptions. Is this the Committee to which you referred in your testimony which is now working on exemptions? Please give a more detailed report on the work of that committee. How many times has this Committee met? Please provide a summary of decisions and actions they have reached. What policies with respect to exemptions have been formulated? What steps have been taken to generate public input into this process? Are meetings of the Committee open to the public or on a record

which is made public? Have any other officials assumed the task of formulating an exceptions policy?

Answer. Is this the committee to which you referred in your testimony which is now working on exemptions?

The committee referred to in CLC Press Release 371 is the committee to which Mr. Walker referred. This committee of senior government officials is known as the Deputies Group.

Please give a more detailed report on the work of that committee.

As Dr. Dunlop stated in the press release establishing the committee, the purpose of the group is to oversee development of general policy governing Council decisions on exception requests filed by individual companies or by a class of companies seeking relief under the price regulations in Phase IV of the Economic Stabilization Program. Dr. Dunlop stated: "This top-level government committee will provide policy guidance to the Cost of Living Council on exception processing to help insure that exception requests are handled in an equitable and consistent manner." He also added that he would ask this group to "advise the Cost of Living Council on disposition of precedent setting exception and prenotification cases and to assist in resolving major price issues before the Council."

The Deputies Group gives consideration to exemption requests and under certain circumstances provides advice with respect to some reconsiderations of denials of exceptions requests. The group also identifies other actions which can be taken by various government agencies to alleviate inflationary price and wage activity and to increase supplies. In so doing, the group reviews the activities of the Cost of Living Council staff, particularly the activities of the Office of Economic Policy, General Counsel, Office of Price Stabilization, Office of Food, Office of Health, and the Energy Division.

How many times has the committee met?

Since the establishment of the group on August 23, 1973, the group has met six times.

Please provide a summary of decisions and actions they have reached.

The Deputies Group, as noted above, is not a decision-making body. While the Deputies Group has made no decision, in its meetings, it has reviewed the Council's development of exemption policies, discussed the problems associated with basic and secondary materials and reviewed policy issues raised in several major requests for reconsideration of Council decisions denying relief requested in exception cases.

What policies with respect to exemptions have been formulated?

Very broadly, the Council receives exemption requests, the Office of Economic Policy does extensive research and analyses of each case, companies and other interested parties are consulted, and ultimately a decision is made on each case individually. As stated before, if difficult issues arise, the Deputies Group is asked for its views and recommendations.

What steps have been taken to generate public input into this process?

A variety of steps have been taken to generate public input into this process through industry and association consultations (such as with the National Association of Manufacturers and the Business Roundtable), the public hearing process, the public comments to proposed regulations, as well as through the CLC Consumer Counsel.

Are meetings of the Committee open to the public or on a record which is made public?

Due to the confidentiality of company data contained in requests for exceptions, public participation in the Deputies Group meetings is not feasible.

Have any other officials assumed the task of formulating an exceptions policy?

No, except those review committees within the Cost of Living Council which were explained in Mr. Walker's testimony.

Question 11. What considerations and criteria govern a decision to amend regulations in lieu of employing the exception procedure? In lieu of employing the exemption procedure? In lieu of issuing a ruling?

Answer. The purposes and applicability of a regulation amendment, an exception procedure, an exemption procedure and a ruling are different and the four procedures are not necessarily interchangeable. Regulations are amended where the change sought to be effected is one of broad and general applicability, consistent with the provisions of the Administrative Procedure Act. The exception procedure, as indicated above, provides relief, upon a showing of serious hardship or gross inequity, from particular Council rules, regulations or orders to an individual applicant or, on a group basis, to similarly situated applicants. Exceptions have generally taken the form of individual decisions, except in those cases where the decision covers such a broad class of individuals as to warrant

a change in the regulations. A ruling is an official interpretation by the General Counsel of the Cost of Living Council published in the Federal Register, which applies the regulations and guidelines of the Cost of Living Council to a specific set of facts. Cost of Living Council rulings are (a) of general applicability, (b) illustrative of a general principle, or (c) of assistance to the public in applying the Act, regulation, and guidelines to a specific situation. Finally, also as indicated above, the exception process is used to remove an industry or a unit thereof from the regulatory system of the Economic Stabilization Program. This process culminates in, or is ratified by, a regulation change.

Question 12. Are parties seeking exception requests and other relief from the Agency entitled to make their own presentation under current procedures? What is the forum at each stage of the process? Is it a formal hearing? Is a record kept?

Answer. Under the Council's procedural regulations governing Price Stabilization matters (6 CFR, Part 155) applicants for exceptions and other kinds of relief are required to initiate their request in writing providing specific relevant facts. The applicant may act in his own behalf or through his designated representative. The applicant or his representative who desires an oral discussion of this issue or issues involved may indicate that desire in writing when he files the request or as soon thereafter as possible (6 CFR 155.11(e)). Every attempt is made by the Council to schedule such a meeting at that stage of consideration of the request that will be most helpful in the expeditious disposition of the request. The meetings are informal and a written summary of each meeting is made part of the case file to which it pertains. In the case of requests for reconsideration the appellant may request a hearing or conference which is held before a Hearing Officer or conferee who has had no previous involvement in the case. This, too, is an informal meeting after which the Hearing Officer or conferee prepares a report including his recommendations as to the proper disposition of the issues (6 CFR 155.197). On the basis of that report together with all other relevant evidence in the case, the Council makes its final administrative decision (6 CFR 155.108).

Section 207(b) of the Economic Stabilization Act of 1970, as amended, requires the Council to afford the parties the opportunity for a hearing before issuance of a final order "which has the effect of reducing wages or salaries." Thus, a request for a hearing is always granted before the issuance of such an order. Hearings in most instances are informal. The record will consist of the parties' submissions, staff analyses, and the Hearing Officer's notes in addition to any other relevant documents received or prepared by Office of Wage Stabilization. A transcript is not customarily made unless at the request and expense of one of the parties.

One hearing on a case is usually granted. A request for reconsideration is viewed on the basis of the record and any new information submitted with the written request; it normally does not result in another hearing or another appearance by the parties.

Question 13. What is the status of regulations, requests for exceptions, and other procedures in the health care field. Are new regulations contemplated and when will they be issued? What procedures have been established for co-ordinating CLC requirements with existing HEW programs? How many exceptions requests in the health care area are now pending before the Cost of Living Council?

Answer. Proposed Phase IV regulations for the health care field were published in the Federal Register November 7, 1973. Comments on the proposed regulations must be submitted to the Cost of Living Council by December 1, 1973.

A substantial and continuing effort has been made to coordinate CLC regulations with HEW health and health care financing programs. This has been aided by Secretary Weinberger's position as a member of the Committee on Health of CLC and by close relationships at the staff level between the two agencies. For example, the chief health planner of HEW serves also as Deputy Administrator of the Office of Health, CLC. The proposed new regulations will significantly reinforce HEW programs and policies:

(a) The treatment of capital projects in the CLC exceptions process will reinforce the recently enacted provisions of Section 1122 of the Social Security Act and the Comprehensive Health Planning initiatives currently underway in the States.

(b) The proposed long-term care regulations separate treatment of Medicaid reimbursement so as to facilitate the handling of exception on a State-wide basis where increases in State reimbursement levels are necessary to bring institutions up to State and Federal nursing home standards.

There are 442 institutional and 157 non-institutional providers of health care exception requests in-house as of close of business November 2, 1973.

Question 14. How does the Cost of Living Council justify retroactive margin rules?—both profit margin and gross margin? The Act speaks in terms of control of wages, salaries, prices and rents. What is the authority for regulation of margins? What is the authority for double and treble sanctions for year-end profit margin violations? What is the authority for complying such a sanction where the Act authorizes only a court to impose a penalty?

Answer. There are substantial differences between the profit margin rule and the gross margin rules. Profit margin is defined as "the ratio that operating income (net sales less cost of goods sold and less normal and generally recurring costs of business operations, interest expense on long and short term debt determined before non-operating items, extraordinary items, and income taxes) bears to net sales as reported on the firm's financial statement or its financial statement as restated pursuant to Subpart I prepared in accordance with generally acceptable accounting principles consistently applied. . . ." (6 C.F.R. § 150.31.) The Economic Stabilization Program regulations employ this concept in a general rule which provides that a firm which charges a price for any item in excess of the base level for that item may not, for the fiscal year in which the price increase is charged, exceed its base period profit margin. (see 6 C.F.R. § 150.11).

Under the gross margin rule, however, prices are controlled on the basis of total permissible revenues for the product line and not on the basis of authorized prices for individual items. Thus for wholesale/retailers gross margin is the total revenues realized from the sales of merchandise less returns and credits, minus the total invoice costs of all merchandise within a category plus transportation allocated to that merchandise divided by either total revenues or total costs (see 6 C.F.R. § 150.303). The regulations further provide, that a firm which increases the price for any item above the adjusted freeze price for that item must control the prices it charges for the category in which the item falls so that the gross margin for that category does not exceed the gross margin realized for that category during the pricing base period. (see 6 C.F.R. § 150.304)

The gross margin concept is also employed in the price rules governing food manufacturing. (see 6 C.F.R. § 150.606).

Profit margins and gross margins, although different, are both functions of price. In our view, profit margin and gross margin rules are techniques of price control, which is authorized by the Act. Further, these techniques provide much needed flexibility to the price control system, both from the standpoint of the regulations and those being regulated. As employed by the Council, the profit margin and gross margin rules are not retroactive but merely use past conduct as a measure of permissible present and future performance. Further, as a general matter, these rules do not come into play until a company raises a price above base price or adjusted free price, whatever is higher.

Economic Stabilization Program regulations have provided for double and treble sanctions for year-end profit margin violations since May 24, 1972. (See 6 C.F.R. § 300.54). The authority for applying these sanctions also derives from the Act, as fully stated in the preamble (copy attached) accompanying the original publication of this section.

[From the Federal Register, May 24, 1972]

CHAPTER III—PRICE COMMISSION

PART 300—PRICE STABILIZATION

Effect of Failure To File Certain Required Reports; Violations of Profit Margin Limitations

The purpose of this amendment is to add two new sections, § 300.53, relating to the effect of failure to file certain reports required by or under Part 300, and § 300.54, relating to Price Commission actions with respect to violations of profit margin limitations.

The new § 300.54 sets forth a variety of possible Commission actions, depending on when the violation is committed, against any person who charges a price above the base price, or charges a price pursuant to a contract entered into before August 15, 1971, if that person's profit margin does or will, as a result of the price increase, in the fiscal year in which the charge is made, exceed its base period profit margin. In the case of a prenotification or reporting firm, the penalties may

be applied if its profit margin for any quarter of the fiscal year, after the charge is made, is at a rate that would exceed its base period profit margin, and the person fails to demonstrate that its base period profit margin will not be exceeded for that fiscal year.

Section 203 of the Economic Stabilization Act delegates to the President specific and exceptional authority to "prevent" and "eliminate" the accumulation of "windfall profits" under the stabilization program. Pursuant to its delegated authority with respect to the stabilization of prices, the Price Commission has prohibited any profit margin in excess of the base period profit margin which results from price increases. When such a profit margin excess results from price increases, despite a reasonable effort by firms to abide by the profit margin limitations and other price control regulations, the increase in profit margin over the base period profit margin, attributable to the price increase, may reasonably be considered to be a sudden and unexpected gain in profit and therefore a "windfall profit" within the meaning of the term as used in the Act. The Price Commission has authority on this ground to "prevent" and "eliminate" profit margin excesses by appropriate regulation.

The authority of the Price Commission to determine price levels results from the delegation of authority in section 203 of the Act to the President to stabilize prices, and further delegation of that authority through the Cost of Living Council to the Price Commission. The authority to fix prices includes the authority to deny all price increases and to permit such price increases as, in the discretion of the Price Commission, appear necessary and proper. It follows that where profit margin increases result from price increases the Price Commission has the authority on these grounds to prevent and eliminate resulting profit margin excesses by ordering appropriate refunds and price reductions whenever the Price Commission, in its discretion, considers it necessary and proper to do so in order to control inflation and fulfill the other purposes of the Economic Stabilization Act.

In accordance with well-established rules of statutory interpretation, any doubt as to the scope of power granted in an enactment is to be resolved in such a way as to promote, and not to embarrass or defeat, the purposes of the enactment. The statement of purpose in the Economic Stabilization Act sets forth the following as objects or purposes of the Act: (1) "to stabilize the economy, (2) to reduce inflation, (3) to minimize unemployment, (4) to improve the Nation's competitive position in world trade, and (5) to protect the purchasing power of the dollar. The means by which these objects are to be fulfilled, according to that statement (section 202), are the stabilization of prices, rents, wages, salaries, dividends, and interest. Therefore, the authority delegated to the President to stabilize prices must be fully adequate to achieve fulfillment of the broad objects stated; and as the prevention and elimination of windfall or unwarranted profits is a specifically mentioned goal of the price stabilization program, these administrative remedies are included within those powers delegated by Congress to the President as necessary to stabilize the economy, to reduce inflation, and to fulfill the other objects of the Economic Stabilization Act.

The new § 300.54 provides for the imposition, in certain cases, of a reduction of revenues by an amount equal to two or three times the amount of the revenues derived from the illegal prices, as required for the purposes of the program. Such provisions are necessary because of the limited duration of the authority under the Economic Stabilization Act: the built-in time lag in determining profit margin overages; the great importance to the Nation of effective implementation of the purposes of the Act without delay; and a need for a strong deterrent—in the absence of which persons could freely violate the limitations with the knowledge that, at worst, they would be ordered back only to their former position with respect to an illegally increased price.

Because the purpose of this amendment is to advise persons concerned of actions which the Price Commission may take administratively with respect to failure to comply with certain requirements of the regulations, in lieu of or in addition to civil and criminal penalties already provided, it is hereby found that notice and public procedure thereon is impracticable and that good cause exists for making it effective less than 30 days after publication.

(Economic Stabilization Act of 1970, as amended, Public Law 91-379, 84 Stat. 799; Public Law 91-558, 84 Stat. 1468; Public Law 92-8, 85 Stat. 13; Public Law 92-15, 85 Stat. 38, Economic Stabilization Act Amendments of 1971, Public Law 92-210; Executive Order No. 11640, 37 F.R. 1213, Jan. 27, 1972; Cost of Living Council Order No. 4, 36 F.R. 20202, Oct. 16, 1971)

In consideration of the foregoing, Part 300 of Title 6 of the Code of Federal Regulations is amended as set forth below, effective May 19, 1972.

Issued in Washington, D.C., on May 19, 1972.

C. JACKSON GRAYSON, Jr.,
Chairman, Price Commission.

Question 15. What is the status of rulings and orders, such as relating to exceptions, issued in prior Phases of the Program? Are parties able to rely upon rulings and orders in their own cases? Are parties able to rely on rulings and orders in other cases?

Answer. Rulings issued in prior Phases of the Economic Stabilization Program have no continued relevance except where there have been no changes in the regulations. Therefore, for example, at the present time, rulings in the health sector have continued precedential value as the health regulations have remained substantially unchanged since Phase II. Additionally, rulings issued concerning the pay regulations have continued validity as guidelines for the present largely self-administered wage control program.

The Phase IV regulations (6 C.F.R. § 150.3) provide that adjustments to base period profit margins effected pursuant to an exception granted under the authority of the Economic Stabilization prior to August 13, 1973, have continued validity and applicability in Phase IV. Otherwise, because of changes in the regulatory system, exceptions granted in prior phases are of no effect in Phase IV.

The Phase IV regulations (6 CFR § 150.1(d)) additionally provide that the Phase IV regulations shall not operate to permit a retroactive increase in prices or rents for goods or services sold or leased while these prices or rents were subject to past or present provisions of this title, or a prospective increase in prices or rents under the terms of a contract subject to a decision and order issued at any time pursuant to this title, except to the extent consistent with such decision and order.

Parties may rely on rulings and orders in their own cases to the extent that such rulings and orders have continued validity in Phase IV (as explained above). Parties may rely on published rulings and orders in other cases. Additionally, the published Questions and Answers provide a body of guidance.

Question 16. Was the memorandum of agreement between CLC and the IRS ever made public prior to these hearings? On page 4 of that memorandum, a number of criteria are listed under which decisions are to be transferred from key districts to the CLC. Please elaborate on those criteria.

Answer. The memorandum of agreement between the Cost of Living Council and the Internal Revenue Service had not been made public prior to the hearings.

This memorandum provides for the transfer of certain prenotification of proposed price increases from the IRS Key Districts to the Cost of Living Council. The criteria contained in the memorandum are general criteria which reflect the Council's decision to reserve to itself the power to make determinations in all cases presenting issues of major importance to the operation of the Economic Stabilization Program.

These criteria are:

(a) Those likely to have a substantial impact on the economy—e.g., ripple effect.

(b) Those which represent a departure from usual operating procedure due to an anomaly in an industry.

(c) Those which present a special problem with respect to the ESP regulations.

Thus, with respect to the first criterion, Cost of Living Council analysts have identified approximately sixty firms in sensitive industries in which price changes may have an impact on the economy as a whole. Because of the highly sensitive nature of these industries and the forward impact and complex price interrelationships, it is important, with respect to an effective economic stabilization program, that their economic activity be monitored by one organization which can develop a comprehensive view of price movements in these areas.

With respect to the second and third criteria listed, the Cost of Living Council has been structured to develop areas of expertise in various sectors of the economy and, therefore, is knowledgeable about and sensitive to operating problems and conditions which may have a specific and identifiable impact on the ability of a particular firm or industry to adhere to Economic Stabilization Program guidelines.

The purpose of the Cost of Living Council is to develop an equitable and effective program to stabilize the economy. The several criteria for the IRS to trans-

fer certain prenotifications to the Cost of Living Council are consistent with and, in fact, necessary for, the achievement of these goals.

Question 17. According to that same memorandum of agreement, CLC is the final authority on all questions of law. That memorandum notes that the Council will provide legal advice. How is this advice provided? Is it provided through the central information office? Are written records kept of such advice? To what do those CLC and IRS officials who provide such advice refer in reaching decisions about such advice?

Answer. Legal advice is provided in several different ways. Written records are available only on questions answered formally by published ruling, regulations, letters of interpretation and decisions and orders. Informal advice is given through telephone or personal contacts with the Communications Center or General Counsel's Office and through reports of questions presented to other offices of the Cost of Living Council. There is no central information office to which all questions are directed or where a record of every formal or informal rendering of legal advice is kept.

In reaching decision on legal questions, the written materials CLC officials refer to include the regulations of Phase IV and, if appropriate, Phases II & III and the freezes, published rules, published questions and answers, letters of interpretations, decisions and orders, and letter rulings. Background papers for prior decisions are sometimes employed along with documents presenting more current economic and policy analysis.

Question 18. The Council has reportedly increased the frequency of rule-making hearings. I understand that hearings have been heard on steel, soap and auto price increases. In addition to supplying copies of notices of proposed rule-making as you indicated in your testimony you would do, please include with such a list the following information: whether or not a hearing was held, the time of notice given prior to such hearings, and the time for opportunity to comment. What criteria do you use to determine whether or not to hold a hearing? Is there a policy of attempting to concentrate hearings on sectors of the economy about which information is currently sparse? Would hearings be useful in industries about which comparatively less is known, such as food services, health services, and legal services?

Answer. In addition to hearings on steel, soap, and auto price increases, the Council has held hearings on prenotified price increases for rubber tire and paper products and proposed postal rate increases. Further, the Council has again held public hearings on proposed increases in the automobile industry. The attached chart indicates the prior notices applicable to each hearing and the actual hearing dates.

Hearings are conducted under the authority of § 207(c) of the Economic Stabilization Act of 1970 as amended, which specifies that to the maximum extent possible formal hearings be conducted to acquire information bearing on a change or proposed change in prices which have or may have a significantly large impact on the national economy.

Subject	Notice Published in Federal Register	Deadline for interested persons to notify CLC	Date CLC confirmed witnesses	Hearing date	Deadline for receiving written comments
Auto ¹	Aug. 22	Aug. 12	Aug. 24	Aug. 23	Aug. 29.
Steel	do	Aug. 23	Aug. 26	Aug. 30 and 31	Sept. 5.
Rubber tire	Sept. 11	Sept. 13	Sept. 14	Sept. 17	Sept. 22.
Paper	do	Sept. 14	Sept. 17	Sept. 19	Sept. 24.
Soap and detergent	Sept. 11	Sept. 17	Sept. 18	Sept. 21	Sept. 27.
Postal rate increase	Oct. 30	Nov. 7	Nov. 9	Nov. 14 and 15	Nov. 23.
Auto ²	Nov. 12	Nov. 15	Nov. 16	Nov. 29 and 21	Nov. 26.

Question 19. Do you employ different criteria for exceptions in different industries? If so, how are such criteria in conformance with Sect. 203 of the Act?

Answer. The basic requirement to receive an exception is a showing of serious hardship or gross inequity. The sectoral approach to controls embodied in the Phase IV regulations and the differing structures of various sectors of the economy necessarily require that what constitutes serious hardship or gross inequity will differ from industry to industry. However, in all sectors, the ultimate question is whether or not the particular applicant has demonstrated serious hardship or gross inequity.

Question 20. Is there a difference between the Council's criteria for issuing individual exceptions and class exceptions? If so, what are they?

Answer. There is no difference in the general criteria applied in individual, as opposed to class, exception cases. It will, however, be generally more difficult to make a showing of serious hardship or gross inequity for a class as a whole since the data used to make that showing must be gathered from the members of the class. The showing must also be made that the serious hardship or gross inequity experienced is in fact experienced by the class as a whole and not by a sub-class encompassed in the class.

Question 21. Are there any criteria for decontrol?

Answer. There are no specific criteria for exemption such as a checklist of economic or other characteristics. However, each exemption action is preceded by a comprehensive study of the industry or sector, which deals with all major economic variables affecting that sector. These variables differ in importance from one industry to another, but in each case, the Cost of Living Council examines the industry from the viewpoint of understanding the effect of controls on the industry and the expected impact of exemption on the industry and on the economy. Because the factors relevant to such examination differ so widely from industry to industry, the Council has found it undesirable if not impossible to establish fixed criteria. Rigid standards would not allow the Council to take into account the unique characteristics and interrelationships of each sector of the economy.

Question 22. What procedures have you established to insure that Cost of Living Council policies are consistent with the policies of other government agencies?

Answer. From the standpoint of exemptions, when an industry under study falls directly within the policy purview of some other government agency, that agency is contacted for an opinion. For example, before the Cost of Living Council exempted the mobile home industry, the Department of Housing and Urban Development was consulted to assure that exemption was consistent with their policies. Generally, the Cost of Living Council participates in a number of regular and ad hoc inter-agency groups on various aspects of economic of policy. In this way the Cost of Living Council's views are available to other agencies and the Cost of Living Council is able to understand the perspective of other departments on particular issues. Informal relationships among staff level people in various agencies including Treasury, Commerce, Agriculture, Office of Management and Budget, Housing and Urban Development, The Federal Reserve, and others provide day-to-day contact in which various policy matters are discussed in the early formulated stages.

Furthermore, there is a formal interagency clearance process which provides Cost of Living Council positions on legislative and other proposals to the Office of Management and Budget and other agencies which request such information.

Question 23. On the basis of 2½ years of experience in implementing the program, please estimate what the impact would be of amending Section 207(a) to provide that the entire Administrative Procedure Act is applicable to the ESP? In additional personnel? In additional cost? In additional time?

Answer. The impact of amending Section 207(a) of the Economic Stabilization Act to provide that the entire Administrative Procedure Act be applicable to the Economic Stabilization Program would be to create an intolerable burden upon the effective administration of the Program. The Act presently exempts the Cost of Living Council only from select tenets of the Administrative Procedure Act which are too bulky and time consuming for effective administration of the Stabilization Program. The most important manifestation of this exemption is to relieve the Cost of Living Council from the Administrative Procedure Act requirement for formal adjudicatory hearings before qualified hearing examiners. The effect is to allow the Cost of Living Council to employ swifter, less expensive adjudicatory procedures in the administration of the Economic Stabilization Program than are required by the Administrative Procedure Act. Without the authority to abbreviate normally tedious bureaucratic decision making procedures, the Cost of Living Council would lose the speed of administration and judicial review which is a prerequisite to effective and equitable action with respect to the highly sensitive and quickly changing economic problems with which it must deal.

No estimate has been made of the number of additional personnel, particularly hearing examiners, that would be required should the Administrative Procedure Act in its entirety be made applicable to the Economic Stabilization Program. However, the number required would be considerable and the costs of hiring, training, and paying them would likewise be extensive. Even more debilitating

to an effective exercise of authority under the Economic Stabilization Act would be the resultant loss by the Cost of Living Council of its ability to react swiftly and effectively to curb inflation.

Question 24. Would you be willing to set forth in detail in each individual case your reasons for a determination that the 30-day comment period will not be employed?

Answer. Reasons for Cost of Living Council determination that the 30-day comment period with respect to normal rule making procedures will not be employed are set forth in the preamble which accompanies each change in the Economic Stabilization Regulations. It has been Cost of Living Council practice, where feasible, to employ the normal 30-day comment period. However, since many regulations have an immediate effect upon sensitive market and labor relations conditions, it is often necessary to forego use of the 30-day period in order to avoid anticipatory market distortions or labor relations reaction which may worsen the inflationary conditions the proposed Cost of Living Council action is intended to correct. The 30-day comment period in many such instances can set off a round of price increases or higher wage demands in anticipation of the effective date of the proposed Cost of Living Council action.

Attached are the following Cost of Living Council Notices of Proposed Rulemaking.¹

Proposed Phase IV Price Regulations (38 F.R. 19464, July 20, 1973).

Proposed Phase IV Food Price Regulations for Stage B (38 F.R. 22797, August 24, 1973).

Proposed Executive and Variable Compensation Regulations (38 F.R. 23628, August 31, 1973).

Proposed Amendments to Phase IV Petroleum Price Regulations (38 F.R. 28845, October 17, 1973).

Proposed Amendment to State and Local Government Exemption with Respect to Sales of Petroleum Products (38 F.R. 29618, October 26, 1973).

Proposed Health Care Regulations (38 F.R. 30850, November 7, 1973).

Proposed Amendments to Phase IV Petroleum Price Regulations (38 F.R. 31686, November 16, 1973).

SELECTED QUESTIONS ON IRS MANUAL

Question 1. Page 5-2, Sec. 3.07. Is any of the information used to monitor program trends made public?

Answer. No. Most requests for interpretations include specific financial and commercial information about the applicant firm and cannot therefore be publicly disclosed. To the extent that particular interpretations appear to have a general applicability they become the basis for public rulings or clarifying amendments to the regulations.

Question 2. Page 4-2, Sec. 5.02. What are "other unusual circumstances" that justify by-passing the issuance of an NOPV? How can results in different IRS districts be kept consistent under such standards?

Answer. The phrase "other unusual circumstances" was placed at the end of the list of specific circumstances to indicate that the list was not exhaustive and that there could be additional similar circumstances under which an NOPV could be by-passed.

All cases are monitored by National Office and Regional IRS representatives and CLC staff through the use of the National Office Review Program, assistance visits, facsimile copies and other coordinated forms of communication. This monitoring is designed to promote uniformity of action throughout the districts on a nationwide basis.

Question 3. Page 4-3, Sec. 6. Who are the impartial conferees referred to in this section? What procedures have you established to ensure that they are impartial? For whom do they work? Are they trial examiners? What steps have been taken to insulate conferees from bias that is inherent in a situation where an agency is both conducting an investigation and reaching a decision on that investigation?

Answer. The conferees referred to in Section 6 are highly trained and experienced IRS employees most of whom have previously been conferees on tax matters. The conferees are senior IRS personnel who have had no prior exposure to the case including no connection with the investigation.

In fact, many investigations are conducted by agents in associate district offices physically removed from the conferee who is located in the key district office.

¹ See p. 410

In any case, agents conducting the investigations are not permitted to discuss their work with conferees but only with their immediate supervisors. The conferee's duty is to thoroughly review all issues in the case to see that the investigator's determination is supported by facts and that ESP regulations have been followed, but they are not trial examiners.

The decisions of a conferee are subject to further administrative and legal review (1) by the District Director who informs the firm of the conferee's findings, (2) by any conferee requested on a remedial order, and (3) by the National Office, the Cost of Living Council, and the Justice Department if litigation is considered. In addition the firm which receives an adverse determination from a conferee may request a reconsideration (See Chapter 7 of the IRS Manual) or an exception (see Chapter 6 of the IRS Manual).

Question 4. Page 4-6, Sec. 13.03. What are "unusual circumstances" that allow penalties to be compromised to zero? What are the general standards that govern the overall process of compromising penalties?

Answer. An unusual circumstance which would justify compromising a penalty to zero would be a situation in which there was an unavoidable technical violation with no adverse effect on the economy. Each case is decided on its merits and the outcome is based on the best possible course of action to be taken after careful consideration of the facts. The subject of compromise of penalties is covered in more detail in Subpart G of Part 155, Title 6, Code of Federal Regulations.

Question 5. Page 2-37, Sec. 15.02a. With respect to the CLC 22, what is an "appropriate explanation" of why a firm has not cost justified?

Answer. An "appropriate explanation" would be for example a statement showing that the firm is engaged in selling exempt items.

Question 6. Page 6-1, Sec. 2.01. What is "piecemeal and limited decontrol" which does not initiate a fundamental change in the Economic Stabilization Program? How can this be justified? What guidance do program officials have to accomplish this?

Answer. The statement makes the point that exceptions *can* serve as a mechanism for such decontrol. To commence using exceptions for piecemeal and limited decontrol would require an executive decision by the Council. No such decision has been made.

Question 7. Page 6-1, Sec. 2.02. Reference is made to cases requiring personal judgment, particularly as related to non-financial factors. What are these non-financial factors? Are decisions about price increases and exceptions applied only in individual cases or on a class basis?

Answer. An exception decision would make use of such things as impact on resource allocation, hardship impact on the community and on the company, consistency with previous orders, etc. Section 3.05 on 6-3 lists many non-financial factors. To the extent they are relevant, the factors are applicable in both individual and class exception cases.

Question 8. Page 6-2, Sec. 3. What is the meaning of the criteria contained in this section? How can an analyst determine what serious hardship is? Please give examples which would qualify under Sec. 3.05. What does the statement that inefficiency will act as a bar to an application for an exception mean?

Answer. These are instructions to the analysts who make the initial review of data submitted by applicants for exceptions. Analysts are highly trained professional individuals who are skilled in reviewing financial statements. They are required to use professional judgment in examining the question of whether a serious hardship exists using the criteria and guidelines developed by the Council which are discussed in Chapter 6 of the IRS Manual. Their work is preliminary and is further reviewed by other groups of qualified individuals to provide the best professional analysis of a case as possible.

Inefficiency acts as a bar to an exception if it can be determined that a company is making poor use of its resources and wasting valuable materials and labor. Also, some type of cost effectiveness program should be evident. It is not the intent of ESP to allow price increases to cover inefficient operations.

Senator MATHIAS. The committee will next hear Mr. Silberman.

Mr. Silberman is a member of the firm of Steptoe and Johnson and a former distinguished Under Secretary of Labor. Mr. Secretary, we are very pleased to have you here.

**STATEMENT OF LAURENCE H. SILBERMAN, ATTORNEY, STEPTOE
& JOHNSON, WASHINGTON, D.C.**

Mr. SILBERMAN. Thank you, Mr. Chairman. I would like to express my gratitude for this opportunity to appear before your committee.

As Under Secretary of Labor from 1970 to 1973, I was involved in the formulation of this administration's economic stabilization policy from its inception. Since February, I have been in the private practice of law and have had an opportunity to observe the impact of the controls program from an entirely different vantage point. I have come to question, with the benefit of hindsight, some of the policies which I was partially responsible for formulating and, therefore, this testimony can be regarded as having a mea culpa strain. Or it may also be referred to as establishing the old maxim of, where you stand depends on where you sit.

I should like first to congratulate the committee for its inquiry into procedures utilized in the administration of the controls program. This examination should raise issues of equal importance to the economic policy questions dealt with by other committees; issues which go to traditional institutional concepts of prime importance to our system of government. In that respect, it is perhaps unfortunate that the Congress looks at these two subjects separately for I believe that there is an inescapable tradeoff between economic and regulatory objectives.

The economists are fond of saying that there is no such thing as a free lunch. By that they mean that all policies have an economic cost which must be reckoned and balanced with the gain sought to be achieved. We have recently become particularly sophisticated in accepting this concept. But I would like to suggest that there is no such thing as a free lunch in a Government regulation sense either. You cannot use Government regulatory powers in our society without accepting the restraints on that power inherent in our democracy. At least you cannot do so without sacrificing traditional institutional interests which may in the long run be more critical than policies directed at temporary wage-price stability. It has been noted I believe by the Chairman, that we can no longer regard the Government's adoption of an incomes policy as a temporary expedient with no lasting impact. In reviewing wage-price controls over the last 3 years and planning for the future, we must evaluate past actions and future proposals not just in terms of economic effectiveness but also in light of the degree of consistency with traditional institutional values. I believe that we encounter a dilemma: the most effective regulation judged in economic terms is often that which most seriously erodes certain traditional institutional values.

Let me say what I mean by traditional institutional values. Perhaps the most fundamental of these is predictability as to the impact of Government regulation. It really lies at the heart of our Anglo-American system of jurisprudence. All of the phrases we have grown to take as second nature, "government of laws and not of men," "due process of law," "equal treatment under the law," all reflect this concept. The crux is that any person contemplating a proposed course of action should be able to determine whether that action is proper under the law or it is not. Insofar as the Government pursues policies which are calculated to frustrate this concept of predictability, respect for the legitimacy of government is ineluctably diminished.

The chairman in his floor speech describing the direction of these hearings indicated that the subcommittee would look into "questions of administrative procedure. * * * sanctions provided for in the Act and otherwise in use"—I particularly enjoyed that "otherwise in use"—

Senator MATHIAS. That was inserted with malice of forethought.

Mr. SILBERMAN. I assumed so—"the mechanism for involvement and its use, and availability of judicial review." But he did so in the context of his proper concern as to the ability of individuals and corporations to both know the nature and extent of their obligations under the law and to effectively present their case. By that, the Senator seems to imply a proposition which I believe to be essential to this inquiry; that is, substantive standards and procedures employed to implement those standards are inextricably interrelated. It should be indisputable that if substantive standards are too vague to afford reasonable predictability, sophisticated administrative procedures and elaborate review mechanisms can be a mockery. Conversely, if standards are reasonably certain but procedure unclear, predictability similarly suffers.

Indeed, one of the characteristics of the controls program has been a mixing of the traditional roles of substantive regulation, procedure, and sanctions. Thus, when a wage or price standard has been promulgated whose vagueness makes safe observation impossible, the controllers have sometimes required prenotification or preapproval so that each action of a designated group is judged on a case-by-case basis. And it is in that way that the substantive allegation is elaborated on an orthodox basis. Even more unorthodox has been the utilization of prospective procedural or substantive obligations as a sanction to discourage present actions not actually forbidden.

Any inquiry into the nature of economic stabilization administration must start with the recognition that wage and price controls are so much more ambitious and difficult to frame than other administrative regulatory schemes as to constitute a difference in kind rather than degree. In that respect, I am inclined to agree with a part of the testimony of Mr. Walker before me. But no other Government department or administrative agency has such a broad mission with such a paucity of legislative guidance. Whether one speaks of the FTC, NLRB, ICC, CAB, or any other of administrative agencies, one finds a governmental instrumentality in the process of, at most, filling in the interstices of a detailed legislative charge. In all of these situations, Congress has formulated a policy in a specialized area of the economy and an administrative agency is only asked to implement that policy. With respect to economic controls, as the chairman noted earlier this morning, the legislative policy formulation is so general and the problems so diverse as to require a massive delegation of authority to the executive branch.

Of course, this raises another institutional question which goes to the heart of the business of this subcommittee. The Congress must recognize that the economic stabilization program has resulted in an extraordinary delegation of what we have always thought of as legislative power to the executive branch. I am reminded of the Cost of Living Council's decisionmaking process during phase I. At that time, several Cabinet officers—phase I of course was the freeze—and

other officials were making scores of decisions with awesome impact on our economy in a matter of minutes. And I do not mean to criticize that; it was necessary if it was going to operate under those kinds of temporal restraints. But, I do not suggest that it would be appropriate for Congress to significantly narrow executive discretion by more detailed legislative policy formulation. The broad delegation reflects the "nature of the beast," or to put it in other terms, the complexities of our economy resist any attempt to legislatively codify a full-blown controls program. Of course, I do not mean to suggest that more guidance could not be provided, and I would hope that this committee would lead in that direction.

Furthermore, even if one could arrive at a detailed legislative policy framework to govern an incomes program it would be too quickly outdated. We discovered as we were planning phase II that one of the characteristics of economic controls in any modern industrialized nation is that circumstances require considerable change in the nature of controls so that the controllers can stay ahead of the economic backlashes. When segments of the economy grasp the implications of a phase of controls, shifts in behavior designed to minimize or affect the impact of control occur. This, of course, is one of the reasons why controllers are prompted toward ambiguous regulation. Thus, if controls are tight, they have to be loosened, and if they are loose, they have to be tightened. Not totally facetiously, I would suggest that controllers historically have to present a moving target.

If this is true, if the basic ground rules of stabilization will necessarily undergo constant change, then, without regard to internal procedure of substantive regulation, predictability suffers. No sooner do regulators develop a full-blown system of regulation than it must be scrapped to catch up with the economy. The U.S. experience in the last several years has certainly been in accord with this proposition.

I should like to turn now to an examination of aspect of the controls program which I believe illustrates the general observations I have made. I have dwelt primarily on pay regulation partly because that is closer to the bulk of my experience but also because pay regulation was initially the *raison d'être* of controls. It was the Government's concern over wage increases which pushed it into this arena in 1971. On the other hand, I would suggest, Mr. Chairman, that the observations I make sometimes with respect to both wages and prices, but other times with respect to wages, do have applicability over the whole program.

On the wage side, from the beginning, the fashioning of wage standards has involved a tug of war between two conceptual viewpoints. On the one hand, there were those who, having accepted the necessity of utilizing Government power, were prepared to articulate broad regulatory standards with sufficient preciseness to afford maximum predictability and to couple such standards with a traditional procedural framework. On the other hand, there were those who perceived significant economic disadvantages in this course because they believed that wage controls had to maintain maximum flexibility. To this latter group, a rigid system would not be able quickly to counter the economic backlashes resulting from controls themselves. Further, it was argued that a fixed standard resulted in distortions of historical economic relationships between employee units.

It was this difference of view, really, which underlay the vigorous underground warfare between the Pay Board and the Construction Industry Stabilization Committee during phase II. CISC, as you will recall, was a creation of an executive order, issued in March 1971, directed only to the unionized sector of the construction industry. As one who was, if you will, present at its creation, I will freely admit that its legal structure was rickety both substantively and procedurally. Indeed, its basic standard for permissible wage increases, not "unreasonably inconsistent" with the goals of economic stabilization, was chosen to give maximum flexibility to the regulators and, of course, minimum predictability to the regulated. I know that because I chose the phrase. Since all construction industry collective bargaining agreements had to be approved by the tripartite commission, this vague standard was deemed an advantageous cloak under which the parties (union presidents, industry spokesmen and the public members) could negotiate and moderate excessive wage increases.

The Pay Board, or at least its majority, sought to fashion a pay standard which could be applied as nearly as possible across the nation, i.e., 5.5 percent with various exceptions, et cetera. Their purpose was to articulate a national standard which could be readily understood, the overseeing of which could be delegated to the IRS, a bureaucracy without special expertise in the stabilization business, certainly at that time.

The CISC proponents argued that a fixed wage standard was counter-productive since it constituted a minimum as a practical matter and furthermore it ignored the traditional relationships between often competing, politically and jurisdictionally, that is union groups. However, because the CISC standard was so vague, its decisionmaking process necessarily had to be highly centralized. Indeed, it would not be an exaggeration to refer to them as personalized. Moreover, this process was also necessarily not open to very great public scrutiny.

The argument as to the wisdom of these two approaches has centered almost entirely on their effectiveness as political-economic policy tools. And, in that context, I would conclude the CISC proponents have the better argument and record. But, if predictability is regarded as a separate institutional value, that is separate from the economic controls program itself, then the preferability of "the flexible approach" is not so clear.

I should not be understood as contending that the Pay Board was a model of governmental regulation in terms of predictability. As a tripartite body—a necessary characteristic in my view—it produced standards which incorporated a great deal of slippery phraseology and its decisions often defied analysis in terms of neutral objective principles. It did, however, manifest a willingness to sacrifice certain economic objectives in order to maintain a nodding acquaintance with traditional regulatory values.

But, it is against the regulatory framework of phase III that I should like to direct my strongest criticism, actually my only criticism. Phase III was a legal fraud. With the exception of those industries over which real controls were continued the rest of the economy was in fact unregulated as to either pay or price. Putting aside the economic policy considerations which gave rise to phase III, it was highly improper for the Government of the United States to suggest by ambiguous regulations and deceptively threatening speeches (the famous stick in the closet, etc.) that it retained some undefinable regulatory authority over

the vast portion of our economy. During this period, pay and price guidelines were to be "self administered" thus implying that the fundamental change between phase II and phase III was merely procedural. But any lawyer, after careful examination of the government's regulations, had to conclude that there was no substantive standard of conduct imposed by the Government. The Cost of Living Council did retain, however, power to challenge any pay or price change and implicitly asserted the authority to order its reversal. In such a challenge proceeding the party challenged assumed the burden of producing evidence that his challenged conduct was "not unreasonably inconsistent with standards of the Economic Stabilization Program"—standards which I submit did not exist.

This, I submit, represents the ultimate triumph of regulatory uncertainty. It was one thing to use the phrase, "unreasonably inconsistent with the goals of economic stabilization" as a CISC standard where every agreement received regulatory approval or disapproval. There it really meant you could raise wages as much as CISC approved. Thus it was not even designated as a substantive standard which would govern private action; that is at least without the government being involved in the process. But during phase III all price or wage changes were theoretically subject to a retroactive application of that standard as interpreted by the Council under circumstances where the burden of showing compliance was placed on the person challenged. No one could possibly know at the time certain action was contemplated whether it would be subsequently regarded as appropriate. I use the word "appropriate" rather than "legal" because it seems to me it would be impossible to use the word "legal" there.

The Government's objective seems to have been to deter certain conduct without paying any regulatory price at all. The analogies made at the time to the tax laws were ridiculous: the American people pay their taxes with unprecedented cooperation because they are legally required to do so, without regard to enforcement techniques. By contrast no one outside the mandatory control areas in phase III was legally prohibited from raising prices or wages to their hearts content.

Here this committee's inquiry into sanctions utilized under controls is particularly relevant. The Government was well aware that it could not have prosecuted persons who allegedly exceeded the phase III voluntary guidelines. Instead it threatened prospective regulation as a sanction for legal behavior (see subpart K). The Government was saying in effect, if you raise your wages or prices, which you have a perfect legal right to do beyond a nondefined point, we will place you under regulation for some time in the future and we guarantee you will be miserable. It is hard to imagine a posture which our Government could take which is more blatantly inconsistent with the fundamental tenets of the rule of law in our democracy.

I might remind the chairman, and other members of the committee, that there was a time back in the early 1960's when a different administration, in attempting to affect price increases in a nonregulated industry, pursuant to no law, utilized some of the kinds of government sanctions, and I might say to the lasting horror of the many businessmen and lawyers in this country. It is my contention that phase III seriously eroded this respect for law by government regulation, by businessmen, unions, and other regulated groups.

The unique phase III approach to Government regulation has continued during phase IV at least as to wages, which Mr. Walker understandably did not want to discuss, to be distinguished from executive compensation which appears to be about to come under mandatory controls retroactively, which after they got the comments and after they finalized the regulations and put them into effect, they are going to apply retroactively back to the time when they first proposed them, certainly a unique approach.

And judged in accordance with economic criteria, this is my important point, it has apparently been successful. But I defy anyone to explain either the substantive standards which govern wage increases during this period or indeed what procedures the Government is utilizing to achieve its ends. In other words, Mr. Chairman, they stopped this for prices, and as Mr. Walker was testifying it is true that as of phase IV the Government has developed a very detailed system of substantive and procedural regulations dealing with prices, but there is virtually nothing that you can get your handle on with respect to wages. And that has, it seems to me, significant future implications with respect to both wages and prices.

As I said, price increases are now subject to fairly detailed substantive regulations but there is ominous talk about the nature of wage-price regulations planned for next year. Perhaps at the expiration of the economic control program in April, and with the continued legislative authority or perhaps beyond that, the scheme which is spoken of and indeed reported in *Business Week* as reflecting the administration thinking is analogous to guerrilla warfare. A small agency with broad but ill-defined powers would search for the economic jugular veins, i.e., those prospective wage and price movements which would be deemed to have the greatest spillover effect. The agency's unconventional wage-price warriors would swoop behind economic lines and threaten, cajole, or persuade those planning these wage or price increases with unfavorable governmental action of one sort or another if they did not surrender. In this way the Government would exert maximum leverage on the economy with minimum regulatory cost. Such a scheme, of course, would wholly ignore the value of predictability in governmental regulation and therefore further erode respect for law in this country.

Whatever short-run advantages this kind of proposal would generate either in economic or political terms, I would urge this committee to direct its attention to insuring that if controls extend beyond April, their administration be consistent with the traditional American restraints on governmental power.

Senator MATHIAS. Mr. Silberman, I thank you for a very thoughtful statement; one that certainly identifies many of my concerns in this whole area. I think your analyses of phase III is particularly useful.

Are you familiar with the Canadian program of economic guidelines?

Mr. SILBERMAN. Which one, Mr. Chairman; I am generally familiar with the Canadian programs. They have different phases, as we have.

Senator MATHIAS. Yes, but the thrust of their program has been one of a major part of the time, as I understand it, of operating without controls, but with guidelines. But I believe the difference you did from phase III is with standards. Am I correct on that?

Mr. SILBERMAN. Well I remember when we were planning phase II they came down and talked to us at that time.

Senator MATHIAS. John Young?

Mr. SILBERMAN. Yes, that is right; and they were, at that stage, fairly befuddled as to what they should do because as I recall organized labor at that point had virtually declared war on the Government.

Incidentally, there is no way that any industrial democracy, in my judgment, I do not think there is any example that would disprove it, can ever have a system of anywhere near as effective, even in the short-run of wage and price controls, without the general tacit acceptance of organized labor. It is just absolutely impossible, which is one of the problems.

Senator MATHIAS. Absolutely. And that is what I was trying to get at with Mr. Walker, this morning. Unless he can create a climate of acceptability he cannot succeed no matter how many computers, no matter how many Internal Revenue agents or whatever people they put to work.

Mr. SILBERMAN. But you know, Mr. Chairman, that presents a dilemma because organized labor has traditionally and quite understandably taken the position, "We do not want any flat rules which are predictable." And we do not want that because if the Government is simply involved in imposing these rules, our reason for existing as unions is really thrown away or jeopardized. And I think they are right in that respect.

Senator MATHIAS. Well, without challenging that premise, let me say there has to be some place within our society where there is a bastion of support for any government program. I do not care whether it is wage and price controls or whether it is the Food and Drug Administration or where, some place there has to be a large body of citizens that feel that this is a desirable program, something that they are willing to support. As I conceive what is happening to the wage and price program, its support is eroding on every front.

Mr. SILBERMAN. Well I must confess to you, Mr. Chairman, I find that a good development. I have come to view wage and price controls as not particularly useful on an economic front and indeed harmful as I have suggested, on other fronts.

Senator MATHIAS. An erosion of law and order.

Mr. SILBERMAN. That is right. That is right.

Senator MATHIAS. That is what it is in blunt terms.

Mr. SILBERMAN. That is exactly what it is. And I think Bill Walker, to a certain extent is right when he says it is virtually impossible to set up a system analogous to any other government agency, the NLRB or FCC or anything. It is just too big. It changes too quickly. And if you really want to get in there and use the economic clout, you have to keep changing the rules around or else make it so flexible that nobody knows what the rules are. So that is really a dilemma. And that leads me to suggest that maybe it is not worth the candy.

Senator MATHIAS. Well, I do not know whether you were here earlier when I was summarizing yesterday's testimony, but we had the most devastating criticism from representatives of the corporate giants, of the consumers and Nader organizations, and from small business organizations. And, of course, George Meany has made it perfectly clear how he feels about that. So that consensus is forming.

MR. SILBERMAN. A very healthy consensus in my judgment. But in any event, Mr. Chairman, the main point that I meant to make here, because as you have indicated, this committee does not have direct jurisdiction over the question of whether the controls program should extend, but my point is that if it does extend there are certain minimum requirements which Congress and this committee ought to direct itself to. And the heart of those minimum requirements is the question of predictability.

SENATOR MATHIAS. And I would assume from what you say that if there is a phase V, it ought not to repeat phase III.

MR. SILBERMAN. Or anything like it, anything like it. What I am afraid, you see I can think about this from either point of view after my experience. From the economist's point of view, if you forget these traditional institutional values, there is an awful lot of merit to developing a system which is so flexible and so vague and really does not have a full blown system of regulation and really does not have any kind of understandable system of regulation, but it gives you legal authority to sort of run around and put an impact on a particular wage and price movement at a particular time; and I said that we may be hit over its spill-over impact. The difficulty with this in the economist's approach with that, is that they are not looking at certain noneconomic spillovers from such a course action. And that is what I am concerned about in the phase V approach.

SENATOR MATHIAS. There is sort of a biological rule here that is not being observed. The World Wildlife Council last week, Prince Bernhard, the chairman, said that they could no longer be concerned with species, they had to be concerned with the whole ecological system. And that is our problem here.

MR. SILBERMAN. Yes, you put that very well.

SENATOR MATHIAS. Let me ask you the \$64 question, and I will not hold you any longer, but in light of our comparatively long experience in this subject, and your knowledge of it, how long do you think—and let me say your announced bias against a control program—how long do you realistically think we will live with some form of controls, active controls, not just a standby authority on the statute books?

MR. SILBERMAN. Well that is the \$64 question. But let me first start by pointing out that John Dunlop, for whom I have immense respect, but with whom perhaps I disagree with the probable course of future events, gave an address to the labor section of the American Bar Association several months ago, I think it was in August, and he said something that I think was terribly important and that is that he first saw the Government coming in and out of the wage-price arena for the balance of this century, not in a formal way—or maybe he implied that occasionally it would be formal—but more that there would be a continuing symbiotic relationship between the Government, labor, and industry, working on these problems.

I would hate to see that happen. I think that is wrong. I think it works sometimes on a short-range basis, as it did in the construction industry stabilization committee and John is really generalizing on that experience, but it sacrifices traditional interests. It really is sort of an interesting next step in the Government process. In the 1930's when the Government adopted the administrative agency approach, it

did so I think, I suggest it did so because it felt that there had to be another layer between the Congress and the courts. I simply think that was a little closer, a little more closer to the regulated class, but which cleared on certain quasi-legislative responsibilities, quasi-judicial responsibilities; but it got a little closer to the regulated class and it could react more quickly.

And I think what Dunlop is referring to are really the systems of controls for the last 3 years which shows another jump down. You know a Government agency is so involved in day-to-day decisions, that it really is part of the decisionmaking process in many cases rather than setting forth guidelines or rules for private parties to operate under. That was so with respect to CISC. I think it is so today with respect to pay activities of the Government. They are sort of involved, they are not really involved, you cannot catch them. But what it really means is, it is a different kind of system of government than we have really come to expect and one that I think carries with it immense threats on a long-term basis, outside of the area of wage and price control.

So I guess my answer to your question is, if John is right in his prediction we are in it for good. We are in this funny hazy kind of way where nobody sets the rules or they are shifting every day. I would personally believe, however, that we have to be out next year. I think we are in it today to the tightness that we are, as Bill Walker stated, because of the worldwide commodity demand.

And the amusing thing about it is the controls have almost no impact on the price of worldwide commodities. We are always in controls for the wrong reasons. Now there are a lot of economists who want to keep controls next year I think primarily because they are afraid of a resurgence of wage push. But I really do not think they will work to withstand such a push, if it comes, so I am inclined to feel that the chances are that administration will be out next year, but that there will be a tremendous temptation to retain some vestage, some small agency that would operate in a manner that I described as a "transitional process" and to avoid the political problems which come about if Congress and the administration just said okay, that is enough.

Senator MATTHIAS. Well if that were to occur, then it would seem to me it is a great challenge to this committee which has the responsibility of trying to maintain the fabric of constitutional government to make sure that in the future there are proper administrative guidelines and the proper statutory standards to avoid the dangers that both you and I agree exist.

Mr. SILBERMAN. I think you are absolutely right. I think it is this committee's responsibility and it very much goes to the question of delegation of power to the executive branch.

Senator MATTHIAS. You have been extremely helpful.

If counsel have any questions they cannot resist, we will invite them, otherwise we will excuse you.

Thank you very much, sir.

We are happy to welcome the next witness here representing the National Association of Food Chains. He is responsible for administering the affairs of an association which numbers more than 200 food chains that operate 25,000 supermarkets and doing a total annual volume in excess of \$30 billion which ought to make you a very respected witness for the committee.

STATEMENT OF CLARENCE G. ADAMY, PRESIDENT, NATIONAL ASSOCIATION OF FOOD CHAINS, ACCOMPANIED BY JAMES RILL, ESQ., GENERAL COUNSEL

Mr. ADAMY. Thank you, Mr. Chairman. Are we under a real time stricture?

Senator MATHIAS. We have enough time if you want to summarize your statement, it can be presented in full, but feel free.

Mr. ADAMY. Well let me do that, Mr. Chairman. I would much rather respond to your questions. Incidentally, I am accompanied today by Mr. James Rill of the law firm of Collier, Shannon, Rill & Edwards, our general counsel.

My statement, in summary, recognizes the tremendous difficulties of administering a program as complex as economic stabilization by the Cost of Living Council. At the same time we are critical of the lack of certainty and of the irrational delays built into the program. We make quite an example of the fact that during phases I, II, III, III-1/2, there was no consultation. The chaos, the political nature of the problem, forced them to issue regulations without consultation with the involved parties, either the public or the involved parties. In IV-A and IV-B we have had consultation. We propose that they are much better rules because of that consultation.

We suggest very firmly that the inbuilding of the administrative act and the consultation procedures is helpful to the Government, to the consumers, and obviously to the regulated people in here.

The exception procedure up to now has been basically a farce. There have not been exceptions granted. There has not been consideration of it, and there is a real need for it.

I will move to the last part of my statement which covers the direct cost of compliance which is in itself difficult to measure. At least one top executive in each firm or division of a firm, has worked nearly full time on the Economic Stabilization Programs. Another 10 to 15 executives in the average firm or division have spent 5 to 10 percent of their time on ESP. This is equivalent to at least a second full-time man. The managers of each of approximately 45,000 supermarkets throughout the Nation have been involved in posting signs, checking prices, and answering consumer questions, and a multitude of other activities, amounting to about 1 man-year per store.

In sum, the Cost of Living Council has, by and large, done an incredible job of administering a difficult and complex program. And if my remarks appear critical, it is only because they focus on shortcomings. The distortions that have occurred can only be corrected by a return to free markets with competitively determined prices. Where one layer of regulation has failed, additional layers of regulations would only compound the failure. The deficiencies which have, from time to time, existed in the Cost of Living Council procedure can best be cured by streamlining and simplification.

Now the report which this committee prepares will hopefully be directed toward these ends. Excuse me for not reading my prepared statement but I hope the committee will put it in the record.

Senator MATHIAS. It will be included in the record in full.

[The prepared statement of Clarence G. Adamy follows:]

PREPARED STATEMENT OF CLARENCE G. ADAMY

Mr. Chairman and Members of this Committee, my name is Clarence G. Adamy and I am President of the National Association of Food Chains ("NAFC"). NAFC is a trade association representing approximately 200 food retailers, including all the larger and a cross-section of medium sized and smaller firms.

It is an honor to appear before you this morning to discuss our experiences with the procedures of the Cost of Living Council. While we certainly agree with all of those spokesmen in the Congress, in the Administration and in the private sector who have expressed their view that the present Phase IV of the Economic Stabilization Program should be followed by a phase-out of controls, it is nevertheless worthwhile to review the procedures which have been used during Phases I, II, III, and IV to be prepared against the unwelcome possibility that they will yet be succeeded by a Phase V.

Food retailers recognize and respect the goals of the Economic Stabilization Program and appreciate the difficult tasks which have faced the Cost of Living Council in administering it. At the same time, however, the last two years have been difficult for food retailers.

In 1966, after-tax earnings were about 1.4 percent, prior to the onset of inflation. Operating results for food chains reported in a recent Cornell University study show that average after-tax net earnings during 1972-73 fell to 0.49 net as a percent of sales. Net earnings after taxes expressed as a percent of net worth are at an all time low and are down 37 percent from the prior year.

It is to the credit of the Cost of Living Council that they have tried to take account of the difficult circumstances faced by food retailers. For example Cost of Living Council Director John Dunlop alluded to "the exceptionally low level of profitability which prevailed in 1972 among food retailers" at the time he issued the proposed Phase IV Food Regulations.

But sympathetic as we are to the difficult tasks which have faced the Cost of Living Council and appreciative as we are for the sympathy which they have shown toward the problems of food retailers, it is evident to us that the policies and procedures of the Cost of Living Council have at times hurt food retailers and contributed to food price increases.

This Committee is interested in the procedural aspects of the Economic Stabilization Program and therefore my testimony will focus on procedure rather than policy. Let me suggest, as a layman surrounded here by lawyers, my own lay criteria for judging the merit or demerit of CLC procedures.

A good procedure is one that promotes fairness. Fairness only can be promoted if action taken under the procedure and the reasons for the action are clearly expressed so that those who are regulated can understand what is expected of them. Abnormal and unusual requirements should be avoided whenever possible and customary business practices should be approved whenever possible. There should be ample notice to those who are regulated that regulations will change, or have changed, and there should be an opportunity to comment on the changes. Finally, procedures should operate on a prompt and punctual basis to deal with problems as they arise.

Unfortunately there have been times during recent months when the procedures employed by the Cost of Living Council in issuing regulations and in granting exceptions have left much to be desired. This was particularly true during the freeze announced on June 13, 1973. Whether or not price freezes are desirable is a policy question beyond the scope of these hearings. It is my view that such freezes are not desirable policy. Nevertheless my discussion here will be limited to the procedural distortions which occurred with the announcement of the freeze on June 13.

The Cost of Living Council deserves a generous credit for issuing both its Phase IV, Stage A regulations and its Final Phase IV Food Regulations in proposed form allowing the opportunity for comment. The regulations which resulted show the benefits of the comments which were received.

However, the Council's freeze regulations which were issued with no opportunity for comment produced problems and economic distortions which were costly to retailers, manufacturers and particularly consumers.

The Cost of Living Council has been publicly criticized for its tendency to avoid the requirement of the Administrative Procedure Act that interested parties be given the opportunity to participate in rulemaking through "submission of written data, views or arguments with or without opportunity for oral presentation." Too often the Council has circumvented this requirement by prefacing a regulation with language that public comment is impractical.

The Cost of Living Council's Freeze Regulations were issued on June 13, 1973 without any opportunity for prior comment. The reasons for this were: "Because the immediate implementation of Executive Order No. 11723 is required, and because the purpose of these regulations is to provide immediate guidance as to Cost of Living Council decisions, the Council finds that publication in accordance with normal rule making procedure is impracticable and that good cause exists for making these regulations effective in less than 30 days.

A Cost of Living Council official has described the "freeze" as "shock therapy to the inflationary psychology which was again sweeping the country." Such shock therapy ignores procedural rights which are provided to help improve the regulatory process. The freeze showed that when procedural rights are ignored there can be serious and adverse substantive consequences. In plainer terms, food retailers and consumers faced food shortages for the first time since World War II.

The severe problems caused by the freeze were enumerated by the Cost of Living Council Deputy Director James W. McLane in a speech to the Commonwealth Club of California on July 23, 1973. McLane pointed out that confectioners, millers, poultry and egg producers and others faced costs greater than they were allowed to charge. Those are the people who supply retailers. They have little incentive to supply anyone at a loss. Many retailers found that they had items which they too were forced to either discontinue or sell at a loss for the duration of the freeze.

In his California speech Mr. McLane pointed out that pork and poultry producers slaughtered breeder stock at "alarming rates" during the freeze. The result was that our customers have had to pay higher prices for pork and chicken.

Certainly there may be situations where it is necessary to publish regulations which take effect immediately. But the freeze is an example of the almost catastrophic impact such preemptory procedure can have.

When the freeze regulations were published, there was a provision in the preface that "Interested persons may submit comments regarding these regulations." If it is sometimes essential to issue regulations immediately, this procedure for comment after issuance should be improved and made more specific. A seven day comment period with some prospect of prompt changes responsive to comment might well have lessened the inequities and economic dislocations which occurred during the freeze. As I have pointed out, it is to the credit of the Cost of Living Council that they did allow comments on proposed Phase IV regulations and Phase IV Food Regulations. The procedures which were followed in issuing the freeze regulations should never be repeated.

The Committee has also inquired about our experience with the Cost of Living Council's procedures for requesting exceptions. I understand that Cost of Living Council officials indicated that the freeze and Stage A of Phase IV were rigorous regulatory programs and, therefore, there would be a responsive exception procedure. Unfortunately, the exceptions procedure during Stage A did not prove responsive.

On August 1, 1973, the National Association of Food Chains requested three class exceptions on behalf of food retailers. The exceptions requested were:

1. Immediate action to place sales of beef under the same regulations which apply to sales of pork and lamb, in order to assure adequate production and marketing of beef at reasonable prices.
2. Immediate suspension of invoice certification requirements contained in Section 140.93 and Sections 130.127-130.129.
3. An exception from the requirements of Part 140.93(d) and (e) allowing retailers to adjust the price of any item, the actual average cost of which exceeds the freeze price the retailer is allowed to charge, to a price at least equal to actual cost.

These seemed to be reasonable requests. They were designed to relieve serious hardship and gross inequity and to prevent market disruption. In fact, if those exceptions had been granted, the program would have been strengthened and the economy would have benefited.

No response to these exception requests was received by us until September 12, 1973, by which time Stage A had ended and the requests were no longer relevant to the new Stage B regulations. The Cost of Living Council response was dated 9 September 1973, the last day of Stage A. It stated that "the request does not show that compliance with Phase IV, Stage A food regulations results in a serious hardship, a gross inequity or serious market disruption." The response indicated that the first two of our exception requests were denied and

that the relief sought in the third request had been provided by an amended regulation published August 24, 1973. The letter went on to state, "You have exhausted your administrative remedies."

Since the procedural rules apparently require application for reconsideration of any adverse cost of Living Council action before administrative remedies are exhausted, the statement that these remedies had been exhausted was apparently a superficial concession. We would have preferred an earlier response and a realistic opportunity to seek reconsideration and, if appropriate, judicial review.

The exception procedure I have described amounts to a denial of administrative due process. The Cost of Living Council ought to see that its exception procedure provides prompt decisions, particularly where it is operating under 36-day freezes and 52-day phases.

Clear statements of rules and guidelines are equally essential to a fair and efficient administration of the program. No fewer than five separate, ambiguous and apparently conflicting statements of the base period to be used in computing a retailer's customary "initial percentage markup appeared in the year following November 15, 1971. As a consequence, retailers were hopelessly confused and yet were unable to obtain uniform, consistent advice from either IRS or the Price Commission. We fully appreciate the near chaotic conditions which prevailed during the early stages of Phase II, following the first freeze. As time passed, however, there was less justification for the absence of clear rules. At the present time, with the history which has taken place, uncertainty cannot be excused.

This issue raises a final point of comment. Too often during Phase II, including in the markup base period situation, the Price Commission adopted the most stringent interpretation of its nuclear rulings and regulations and applied this construction retroactively. As a result, a number of companies, including food retailers were required to effect substantial price rollbacks. In other words, they were penalized for innocently adopting a rational interpretation of a ruling which conflicted with that of the agency staff. As a non-lawyer, I am not an expert on the nuances of retroactivity in the legal sense. I simply know it is unfair and discredits the program to force rollbacks under the described circumstances.

The Economic Stabilization Program has been a costly one with which to comply. A major cost has been the time top company executives must devote to informing themselves and their employees about changing program regulations and requirements. Extra outside legal and accounting fees abound. The cost to companies and their customers of diverting key people from their major responsibilities is impossible to calculate. The customer and the company pay for this in services or programs *not* performed.

The direct cost of compliance is itself difficult to measure. At least one top executive in each firm or division of a firm has spent near full time on the Economic Stabilization program. Another 10 to 15 executives in the average firm or division of a major firm have spent 5 to 10 percent of their time on the Economic Stabilization Program. This is equivalent to a second full time person. The managers of each of the approximately 45,000 supermarkets throughout the nation each have been involved in posting signs, checking prices, answering consumer questions and a multitude of other activities amounting to about one man year per store.

In sum, the Cost of Living Council has by and large done a creditable job in administering a difficult and complete program. If my remarks appear critical it is only because they focus on shortcomings which have appeared in the hope that they do not recur. Most important however, Congress, the Administration and the public must recognize that a price control program has not stabilized price levels and economic conditions in the food industry.

The distortions which have occurred can only be corrected by a return to free markets with competitively determined prices. Where one layer of regulation has failed, additional layers of regulation would only compound the failure. The deficiencies which have from time to time existed in Cost of Living Council procedure can best be cured by streamlining and simplification. The report which this Committee prepares will hopefully be directed towards those ends.

Senator MATHIAS. And we would like to explore some of the areas that you have mentioned in your statement.

One of the interesting areas is the area of the question you just raised, the area of the cost of compliance. In the course of these hearings, we obtained from the Cost of Living Council its own estimates of completing form CLC-22, is the phrase used in the trade, and the Cost of Living Council itself estimates that it requires 2,000 man-hours to complete that form.

MR. ADAMY. That is a rational figure and that would be per quarter, sir, and then you have an annual report, and so in a year, you are talking in the neighborhood of 10,000 hours to complete the reports.

SENATOR MATHIAS. And you are not talking about checkers?

MR. ADAMY. No, no, no, no. And Senator, please remember this: the people you are talking about are people who are diverted. The cost is not only the direct cost of having filled out these stupid forms, but what else could they have done.

SENATOR MATHIAS. The creativity, the amount of time invested in the economic system, if they were free to do so?

MR. ADAMY. Exactly what I am saying. The cost of the paperwork, the involvement of the program, exceeds one-half of 1 percent of the sales dollar. So every dollar you spend for groceries—

SENATOR MATHIAS. Well that is a bunch of markup.

MR. ADAMY. That is more than our net profit. That is more than our net profit after taxes, and it is probably more than that. But again I propose to you that that is not the big loss to our society.

No, the big loss is what else might we have done? Could we have developed more and better ways to reduce prices or provide a better service? It certainly has not reduced prices. We might have reduced prices if we had the freedom of our key people, because remember, the penalties of the program are very ferocious. As you have noted from the headlines in the newspapers, they have been used extensively because they punish us more severely with bad publicity than the actual costs of fines or rollbacks. In the grocery business, as in most businesses, if you lose public confidence, you have lost out.

SENATOR MATHIAS. And of course this is a weapon which is very difficult to sheath once it has been used.

MR. ADAMY. It is almost impossible, and the Internal Revenue Service, which has totally competent and dedicated men—and I do not want to attack them personally—are not business experts. And most of the violations that have been reported are highly technical violations. As I indicate in my statement, many of them involved a “good faith” firm interpretation of what was the base period during phase II. Incidentally, there were five different interpretations on the base period put out. No clear interpretation of any one was released. Our people go ahead and make what would be a rational, fairminded decision, thinking “this is what they mean” and IRS comes along and says, “No, that is not what we mean. You are wrong.” And bingo, you are in the newspapers and forced to go through a rollback procedure.

SENATOR MATHIAS. Well that was what I was referring to this morning in talking to Mr. Walker, is his manual which you have not had a chance to see yet nor has anybody else in the public had a chance to see yet, but it is a monumental work. But it is monumental in breadth rather than depth; it covers a wide area but it will not really tell you what you want to know.

MR. ADAMY. No, and as you understand, first of all, control programs cannot work. They just cannot work. The economy is too complex, too big, too many interrelated and interdependent. Mr. Walker started to go through with you only a very few of the very simplistic facts on the huge problems with fertilizer which is a very clear example of the distortions a control program must create.

Certainly fertilizer comes from several sources, but one of the sources is the petrochemical industry—natural gas—which is in short supply and the supply is needed in many places.

But where we end up today is, it sells abroad for 70 cents and it is frozen. It is controlled in the United States at 40 cents. Now, so where is it going? If we do not get that fertilizer on those wheatfields being planted today, we lose bushels per acre for next year, which is so desperately needed.

But you can go on and on. This is but one very small example.

SENATOR MATILAS. Well you can take it right into a subject that I am sure you are familiar with is beef which in world markets is—has been—considerably higher than in the U.S. markets.

MR. ADAMY. And the irony is it will continue to be higher in that we have some protection in the United States. The product is somewhat different than they have abroad, and they do not really care for our beef. However, they really care for our feedstuffs, which is at the input, and 70 percent of the cost is in feed. And so they do affect our prices dramatically. And as you know, in the stupidity of the second freeze or when we had the freeze on meat products, we literally killed off young chicks and pregnant sows to the degree that our supply is shortened for months ahead. Now fortunately we increased our supply of beef at that stage of the game. But remember that that story was told not by the control program, but by the American consumer.

You may remember on August 14 we peaked in prices. To give you an easy example, we were paying 77 cents for pork loin which is the basic cut we buy to sell you pork. On August 14 the price reached \$1.15. On August 15, or thereabouts, the American housewife said "enough is enough" and they quit buying. And by the time of September 12th, the price for pork loin had returned to 74 cents. But it was the input of the American consumer and the dramatic decline in demand that occurred from an unorganized, but nevertheless almost universal, action across this country that reduced the level of demand and made the whole situation reliable.

I cannot emphasize to you enough that it was not the control program that put us into a more favorable situation on these products.

SENATOR MATILAS. Well now since the focus of this committee is not on the policy itself, but on the way the procedures work, did your industry have the feeling that it had access to rational responses at the Cost of Living Council as you approached each of these particular benchmark periods?

MR. ADAMY. The answer is yes, and no. Yes, in that I agree with Mr. Walker's statement that they are available to us: we can talk to them. But I might just as well talk to that wall for all the good it does. In phase II there was a determined attempt to force us into a pattern of business that we had never done before when we were required to use the item-by-item, instead of the category system. We are a category

industry. It is only in categories that we have pricing structures or control structures, and this is typical of what was going on, in a nice class book situation. Maybe we even should have an item-by-item structure; but we do not have. And throughout all this period of time the conflict has been between normal business practice versus what some very bright, fine, clean, dedicated youngster believes we should do. And this is where you get into very great difficulties with this although I must again hasten to add there has been no closed door. We have been able to get in and argue, even shout if we wanted. But as far as making an impact until phase IV——

Senator MATHIAS. Except what it did to your feelings?

Mr. ADAMY. Well a time or two it did relieve some of the feelings. That is true, but that is about all the good it has done, sir, to be very honest with you. Because it is so complex and so difficult to understand.

I think our industry is particularly harmed by this program. You walk into a store and there is a group of cans on a shelf. Anybody can put a can on a shelf. Some housewife takes it off the shelf and you run it through a cash register and the housewife takes it home. It appears to be a highly simple business. Unfortunately, that is not true. It is practically the most complex of all businesses and it is a very, very difficult business to keep control of because you have a tremendous total volume—over \$100 billion a year in sales as an industry. For food at home, now not all food, but just for food at home it is about \$106 billion with the average item selling for about 30 cents a piece—the average item. There is an immense amount of items with a very, very low per unit cost, with our price, and many resolved in a very, very low net profit in the end to us.

The control structure must be immensely complex, and indeed it is. This has been difficult to get across. Phase IV is more viable than any previous one.

Senator MATHIAS. Do you have an ability, or do you feel confident that you can get pertinent data into the area of perception: not merely sending it over there and having it filed somewhere, but where it actually gets attention and you can get some feedback as to whether they accept it or contest it or have some alternative?

Mr. ADAMY. Yes. Well, with the creation of phase IV there was a Food Advisory Committee established at Colc. and some of our industry's truly great leaders serve on the committee. They have the advantage of being there day after day to complete their functions. And that helps tremendously. Prior to that we were not able to get into the kind of open, round-table, give-and-take discussion of nonadversary proceedings that would permit us to share knowledge of procedure and method in normal business practice.

But with the advent of the Advisory Committee, we have done much better. I think it is proximity, and you have to earn your right to be there, to be heard that well.

So, again, I think we support the position that consultation is a big part of the answer. The Food Advisory Committee, I think, is a very good idea. It has been useful to Government, to consumers and to the industry.

Senator MATHIAS. Well, that brings us to the consumer, because certainly the food industry has paid a lot of attention in recent years to its relations with consumers.

The visible efforts that are made to establish consumer relation programs of different chains are, I think, interesting, and I hope that it will be useful to the industry.

But do you get any feel for the consumer reaction to consumer relations with this program? Is there a consumer representative on this advisory council?

Mr. ADAMY. Yes, sir. There is consumer representation in the Council, on the Food Advisory Committee, officially there.

Consumers have a difficult time. This is a difficult program for consumers per se, sir, because it is not a price control program; it is a margin control program. Therefore, it makes it very complex for one directly in the business to understand it.

Now, I have a feeling we made galant efforts to try to explain what the program is. I am sure that the Government has, likewise. Unfortunately, it is very difficult to understand, and I think that the consumers are in a relatively fair posture of saying, "talk to me—not about a program, sir—what about prices today?"

And I think the only way we are going to impress consumers is, hopefully, with a price downturn, which I really think will occur for food—not total economy—but for food. I think it will occur before the first of the year, and I think we will have a much better price outlook in '74.

And I am looking forward to much better consumer relations because of the absolute fact that prices will be better.

Senator MATHIAS. There is no argument about a penny up or down on the scale.

Mr. ADAMY. I think it is just like the consumer boycott, or consumer resistance that occurred in August of this year; you cannot define it. It was not organized. Just enough was enough, and they enunciated it.

I think what the consumer does is very wise: They say, "do not concern me with the nonsense around it, what is the sum total? And up to now the sum total has been prices have gone up, that is what we do not want." If prices go down, and I am very hopeful about that, I think that they will be very approving.

Senator MATHIAS. Now, you testified you felt that your relationship with the program is better under phase IV.

Mr. ADAMY. Yes, sir.

Senator MATHIAS. It is still expensive?

Mr. ADAMY. Very expensive and a great nuisance. It is still on the magnitude of expense that we talked about earlier. There is no reduction of expense under phase IV at all.

It is a very difficult program. I think there are two things that work for it: First, there is more consultation and the program is more in step with the way the business is run; and, second, in 2½ years we have had to learn something. We have become more familiar with the program and working with it. My people are relaxed a little bit more. They tend to go ahead and get it done instead of getting so awfully frustrated about it; and those are big benefits. But the cost has not been taken out.

Senator MATHIAS. I do not know whether you can really answer this question, but I wonder what about cost and other burdens under the different phases. Phase I was the initial freeze.

Mr. ADAMY. The most expensive phase to us was III-1½, the most expensive of all. Phase I came at a time when the country so desperately needed it. It was a very big 2 by 4 across the head of the country to say, "fellows, wake up." We are in real inflation. It was expensive, but that we lived through easily.

Phase II was very difficult because of the arbitrary rules that were imposed upon us. Phase III was difficult to live with, very difficult to live with, because only three of us were controlled, only three elements of the economy were controlled, and we were one of them.

And so in addition to the difficulties of the program, all of those people had all of that time to give us all of their attention, and whereas I do approve of attention from time to time, I thought that was a little much.

But phase III-1½ was by far the worst because our retail prices were frozen, and the cost of our raw materials was not frozen. And so at the end of phase III-1½, more than 30 percent of the supermarket companies in the country were operating at a net loss. So I cannot minimize; that phase III-1½ was by far the worst.

Phase IV-A was not much better with respect to earnings and IV-B will be a little better. We certainly will not recover those earnings. But, will not continue to lose as much as we have been, because we are able to pass through the cost of goods sold.

The inequity of phase III-1½ is something the country should never forget. You freeze at an intermediate point and duck; you cannot change—well, for example, we were frozen on beef at a time when the live weight price was not—our prices were frozen at, give or take 92 cents, the average retail beef price. The live weight price sold to the farmer was \$47 and during that period of time, the price went up to \$58.

So those of you who got meat from a supermarket got it with the great graciousness of your supermarket operator, who paid dearly for the privilege of providing it to you. I think that is merely an example of hundreds of cases.

Senator MATHIAS. Well, that is not too different from the gas retailers of today, who are at the nozzle end of the hose and being expected to bear the economic burden.

Mr. ADAMY. It is the same thing, and there is a great amount of that still in the program, as we go through a great many of these distortions that are built into the program. And we are going through some very mean days right now in some respects.

Fortunately, on the meat or protein side, you have got a downward market, which is solving a lot of problems; and our ease of mind with phase IV-B is as much related to the downward trend of the meat market as it is to any other single factor, I must add.

Senator MATHIAS. If live weights go up again, and I have heard of outlandish live weight prices like 32½ cents, and I hear of one—this was a 4-H sale, where it is not a normal market situation—of \$1 a pound live weight.

Mr. ADAMY. Well, I really do not expect it is going to happen, sir, because if it does I hope to find a far remote spot to hide in. But I do not think it will happen, because as you will recall in the period July 17 through September 9, there were a million less cattle killed this year than last year.

Now, these cattle out there overlayed the market. Now, as of today, the kill rate has not returned to last year's kill rate; so you tend to still build up the extra supply.

The second and more important factor is in late 1970, the market started to look good enough that cattlemen started to build up the basic census of the herd. And we had an increase in 1971 of 2.2 million in breeding a herd. Then in 1973, another 2 billion increase; and this year, it looks like there are 3 billion and underline it with "if Department of Agriculture statistics are correct." But there was a big build-up.

Right now we are at the beginning of the end of the 3-year cycle, so those cattle that were withheld, those heifers withheld for breeding purposes now are producing extra stock. Therefore, from this time forward, we will have a constant increase in the supply of beef.

And I whistle nicely as I walk past graveyards, too, sir, but I really do have some optimism on that side; and on the grain side, the feed side looks much better. If the Lord keeps smiling and we get some dry weather in the Midwest and get those crops out of the field that are out there, we really should be in a much better position and will have reason to be optimistic about a rational price. Do not mistake me, we will not go back to the old days. They are not going to be \$20 live weight cattle again—please God that there will not be.

We have no advantage in bankrupting the farmer; no one does. But on the other hand, rational prices, I think, are the objective.

Senator MATHIAS. What you are painting is a picture of an economic climate which really does not bring you into serious conflict in this particular area with the Cost of Living Council. In other words, it is a downhill slide.

Mr. ADAM. That is future. Since August 15, 1971, we have been in very direct contact because it has been an unhill slide. Incidentally, we have begun to receive increases in canned and packaged goods starting with August 12, the beginning of phase IV-B for them.

Now, they were permitted some increases on September 12, and some on October 12, and we can only put x number in a store. So it will be sometime in November before this cost increase is reflected; if, as I hope and believe they are one-time-only cost increases, we will be through that. But we are still—on other than protein products—on an up market, and I am hoping that the American people will receive a very good Christmas present of a very good CPI. That would mean that in the first week in November the prices would be more favorable, and they would be reported on December 21, and it will be a nice Christmas present for our people to recognize that it had been a little bit better.

Senator MATHIAS. Well, now you said in your statement that you did not want to go into any depth on the question of retroactivity, but what does retroactivity do in just a very broad, general sense?

Mr. ADAM. It will just about ruin us. Let us talk about wages. Yesterday, I got a call from a nice little guy who has eight stores up in middle Pennsylvania. On the first of March 1972, a labor contract was terminated; a new contract was agreed to with a union in a very short period of time; reviewed by IRS in midsummer, rolled back to 5½ percent; and, appealed by the union after being approved by the union sometime in the fall.

In September 1973—18 months later—the appeal was granted for the full amount of the contract itself. This poor little devil is caught with 18 months of retroactivity—several hundred thousand dollars far in excess of his earnings.

Now, he is going to appeal, but how? And we will desperately try to help him out because of the inequity of a retroactive settlement.

On the price side of it, it is the same kind of thing. You take a decision which you think is in the confines of the program, and the IRS comes along and says no; you were wrong. You are told to roll back prices to reflect that amount of money and give the customers back that amount of money, which can run from very little to quite a lot.

I think the most dramatic example I can give you is in a Southern State. One of my members, a rather small company of 35 or 40 stores, was ordered to roll back about a million dollars, and being a normal, competitive American, the company decided to make the best out of it. They sold 5-cent-a-pound sugar, and 19-cent chickens and really moved the million dollars out in a hurry. Every pantry in south Georgia was full of enough sugar to do whatever they are going to do in the next 5 years, and it disrupted the whole competitive structure.

Obviously, the smaller the company, the more they were hurt by such an active program. So not only do you, the company get caught by those ripples that reach out to the far lakeside that is almost impossible to see. Retroactivity is a very cruel act, because planning ahead we expect to do that. Any businessman must be expected to meet his own future, but once you have lived through it and have to go backward by some arbitrary, capricious act imposed upon you from an omnipotent Cost of Living Council, it is very hard to live with.

Senator MATTHIAS. Well, summarizing what I take for your testimony, if we have to review this Economic Stabilization Act at the expiration of the current period, you would like to emphasize the area of openness, which has developed, you feel under phase IV-B, in which there is greater access by the public, by the industry and by the consumers to the regulating agency; so that your views can have some realistic impact, and not just a formalistic finding.

And second, you would like to see the retroactive feature prohibited.

Mr. ADAMY. And add to that the element of certainty. We had an 18-day freeze. We had a 52-day phase. It is impossible to live with.

Another good example—when phase II started, we had a 25-page booklet of regulations. When phase II ended, we had 586 pages of regulations. I almost broke my association with the mailing bills to get all the information out into the field to keep the people informed.

Change is another point in this. You need, as you say, regulations that have depth, understandable depth. In addition to that, you have got to quit changing the regulations every day, every minute, every hour.

Senator MATTHIAS. One of the questions that has come up, and let me ask this very briefly, is in this area of certainty and of predictability; in that if there were public hearings of such substance that the area to be regulated could be totally examined, that then your industry, other industries, consumer groups could all come in and present the complexities of their particular situations, which could then be contem-

plated. And that rather than have hundreds of changes on regulations, you would have one broad regulation under which an industry group could live from the very outset.

Now, my question is in your industry, do you think the situations occurred in such a crisis atmosphere that they had to go forward without these kinds of thoughts?

Mr. ADAMY. In my statement, I am much less critical of the actions in phases I and II than I am of the later actions. It was a crisis at that time, and the country was moved rather rightly or wrongly into that program, and there was a need to get expedition built into it.

I am much less critical of the beginnings than I am of the later days, and the needs of a continuing consulting network. Generally, I agree with Mr. Walker that any control program will distort and has inequity built into it; therefore, I do not see all of this need for so rapidly changing it than one inequity will not create five more, more careful it might—

Senator MATHIAS. If you wait longer, you can ask for more views, you could get more information.

Mr. ADAMY. You could, well, be on a safer ground, a more solid ground, and a fairer ground for everybody; for consumer and for business alike as well as government.

Senator MATHIAS. Thank you very much.

Thank you both very much.

The information provided by the Cost of Living Council, which we referred to in these hearings as the IRS Manual, will be admitted into the record,¹ and the record will be kept open for 10 legislative days for the addition of any related materials.

The hearing is adjourned.

[Wherenpon, at 1 p.m., the subcommittee was adjourned.]

ADDITIONAL STATEMENTS SUBMITTED FOR THE RECORD

OCTOBER 18, 1973.

STATEMENT OF EUGENE A. MARCH

My name is Eugene A. March. I am vice president of Colt Industries Inc. responsible for the Materials Group of Colt. The Materials Group produces and markets specialty steels, through Crucible Steel, a subsidiary of Colt.

The Cost of Living Council has discriminated, under Phase IV, against Colt as a specialty steel producer. I speak about our own situation, by way of providing your Committee with a case history, but I should note for you that the specialty steel industry in general as well as Colt in particular is the object of this discrimination. I am speaking here only with respect to my own company, insofar as its experience illustrates present tendencies in the Council.

I bring the situation to your notice in hope that the Council can be encouraged to return to the procedures of fairness and equity which marked the administration of the Economic Stabilization Act before Phase IV. The criticism is not directed at the law, but at variable application of the law which results in gross inequity for one industry. It is not the task of the Congress to execute the laws which it passes. But I know that the Congress is concerned to know whether or not the laws are properly executed.

The steel industry as a whole is accorded special treatment under Phase IV. Special Rule No. I, which the Cost of Living Council announced on September 10, 1973, restricted to flat-rolled steel the steel mill products for which price increases could be permitted in 1973. The Rule relates only to steel. It limits implementation of prenotified allowable price increase to an increase of one half on

¹ See vol. 2 of these hearings.

October 1, 1973, and the remainder on January 1, 1974. Thus in two respects the industry is treated differently from most American industries. First, only one product is susceptible of price increase, regardless whether other products can be cost justified for increases. Second, only half the increase is currently permitted, regardless whether the entire increase is cost justified.

The specialty steel segment of the industry is subjected to further discrimination. Its flat-rolled product is excluded by the Cost of Living Council from price increase under special Rule I. That Rule as published does not mention exclusion of specialty steel flat-roll. The exclusion comes to light in the text of the order by which the Cost of Living Council sets forth its decision respecting an individual company's request for increases in prices of steel mill products. The order is a private document, not published, which makes it clear that the specialty steel industry is authorized to increase no price at all. The exclusion appears to be an example of rulemaking after the fact. That is indeed our own experience, that the Rule was changed without prior warning, without notice, and without hearing by the parties affected.

On August 7, 1973, the Cost of Living Council published "final regulations" for Phase IV. The regulations include "Subpart J—Special Rules," of which paragraph 150.220 "Stabilization of particular industries and sectors" states:

"(a) Whenever the Council finds it necessary to achieve the goals of the Economic Stabilization Program, it may issue regulations providing for the stabilization of prices in a particular industry, sector of the economy or part thereof.

"(b) The Council may order public hearings with respect to the regulations issued or to be issued pursuant to paragraph (a) of this section if the Council determines that public hearings would aid in achieving the goals of the Economic Stabilization Program."

After companies, in accordance with the final regulations, submitted prenotifications for steel price increases, the Council on September 10 announced its special Rule I, in accordance with Subpart J.

The special regulations comprised in Rule I failed to distinguish specialty steel from steel in general, except that it did not grant specialty steel the one benefit which Rule I gives to steel in general—permission to increase prices on October 1 of flat-rolled steel products. In seeming contradiction of paragraph (a) of 150.220, the Council did not issue regulations concerning specialty flat-rolled; it extended the Rule by letters to prenotifying companies. In seeming contradiction of paragraph (b) of 150.220, the Council did not include specialty steel companies among those testifying at the hearing which the Council conducted on steel pricing.

Once Rule I was interpreted to suit the rule-maker, there was an almost total denial of opportunity for a price increase for makers of specialty steels. The published wording of Rule I in paragraph 3 eliminates the possibility of approval for price increases before January 1, 1974, on any steel product except flat-rolled. The unpublished amendment to Rule I eliminates the possibility of approval for price increases on specialty steel flat-rolled before January 1, 1974.

As a result, the Cost of Living Council has trapped the specialty steel industry in a six-month price freeze. The most recent authorization of increase under the Economic Stabilization Act occurred last June. The nearest prospect of a further increase is January 1 (without certainty of approval then).

The denial of ability to recover cost increases through price increases amounts to a six-month freeze on prices of all major specialty steel products. The effect is retroactive as well as immediate.

Mine is, I think, the only industry in the United States subjected to such a near-total freeze. This is blatant discrimination.

The treatment is also arbitrary, in that the Cost of Living Council has not publicly or privately explained or attempted to justify the singling out of one industry for extraordinary, repressive treatment.

The specialty steel industry differs in critical ways from the carbon steel industry. The specialty companies are comparatively small. They are labor intensive. Their steels are alloy steels, heat-resistant, corrosion-resistant—the stainless steels, tool steels, hi-speed steel, other alloy. The product has special elements which make them more costly per unit of weight than the familiar tonnage steels, and which require special skills in manpower required in production. The effort of the Cost of Living Council to treat the specialty steel industry as an undifferentiated part of the steel industry as a whole results now in specialty steel's being denied recovery of cost increases on 95 per cent of its product.

The gross inequity of it is that, as the Council's policy impinges on my com-

pany, the specialty steel industry is being required to protect the country from inflation without itself being protected from the many cost increases which add up to inflation. The industry pays more, but is forbidden to ask others to pay more. That contravenes the cost-pass-through policy which the Council is, rightly, applying for the benefit of the non-steel industries. The unfairness in this discriminatory application of the law and regulations is compounded by the fact that the industry of which I am a part has been earning small profits and making a limited return on sales or investment. But the Council apparently has chosen this industry to be the dam against inflation for everybody else.

Costs of production are rising beyond our control. Increases in wages and benefits and increases in the costs of energy are increases we share with the entire steel industry. As an example, on August 1, our segment of the industry had to make the same labor increases as all other steel companies. The cost of scrap is increasing, and is not controlled. We buy imported raw materials such as chrome, nickel, and cobalt on which there are no controls because they are imports. We feel increases in the cost of investing in and also operating environmental protection equipment. We are not permitted to recover those increases in cost. That is a form of taking property without due process.

The general rules announced at the outset of Phase IV did not prepare us for discriminatory treatment. And it is possible that the administrators of the law apply the discrimination without being aware of all the facts. They arrived at this position in the dark, without public hearings involving specialty steel, and lost the benefits which such hearings can provide. As a result, it is possible the Council lacks understanding of the potential and actual impact of the inequity.

One impact is that it is difficult—close to impossible—to anticipate the requirements of the Council from simply a knowledge of the announced regulations, since rules are changed without warning.

A further impact is the difficulty of planning in security and confidence. How to budget? How to justify capital expenditures? One must plan in the economic dark when there is an absence of orderly administrative procedures in the federal government's control of the economy.

I am not soliciting the help of this Committee in resolving economic problems. But it is important for the Committee to understand that the discriminatory procedures in economic controls pose an economic hazard to the nation. As a citizen, I do not want to be subjected to rules that are not publicly disclosed. I do not want to be subjected to rules that are made for me alone. And I do not want to be subjected to rules that hold me in an economic straight-jacket. If the Economic Stabilization Act is to remain actively in effect, I trust that this Committee will guide the Cost of Living Council back to the fairness and equal-treatment procedures—the reliable American and democratic procedures—that characterized Phase II.

STATEMENT OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

In behalf of the Associated General Contractors of America, a trade association of over 9,400 of the nation's leading general contractors, we offer the following remarks concerning the administration of the Economic Stabilization Program:

(AGC membership is comprised of more than 9,400 general construction companies performing construction work in all 50 states, the District of Columbia and Puerto Rico. Of this total, approximately 42% perform all or part of their work open shop.)

One of the principal reasons given for the imposition of wage controls in the construction industry has been the unusually large increases in negotiated wage rates. There have been no allegations or documentation that similar inflationary wage increases were being initiated by the open shop portion of the construction industry although it is commonly recognized that open shop employers have to adjust wage scales to those prevailing in their labor markets to man their projects. However, the open shop portion of the construction industry has been treated by the Cost of Living Council as if it were a major contributor to inflationary wage costs in the construction industry, by receiving more onerous administrative treatment than other portions of the industry. The AGC has protested discriminatory CLC treatment of open shop contractors.

An example is the CLC policy of permitting open shop contractors to use only the dollars and cents increase approved by CISC for union contractors, rather than the union wage rates, as such. If the increased negotiated wage rates are not considered inflationary when paid by union contractors, the question remains unanswered as to whether they become inflationary and prohibited if paid by open shop contractors.

The rationale seems to be that since open shop contractors had been using lower wage rates in the past that CLC is not responsible for the wage differential now. The fallacy, of course, is that the demand and supply of construction labor in a given area change. By ignoring this fact, the CLC policy places open shop contractors at a competitive disadvantage vis-a-vis union contractors.

We believe that CLC acknowledges that its regulation in this regard may be inequitable by attempting to offer an alternative solution. This alternative course of action is for open shop contractors to petition the CLC for permission to pay higher wage rates, when proved to be necessary, to retain or obtain essential skilled manpower. That route is impractical, however, because of the time element and should have been rendered unnecessary by permitting open shop contractors to pay any CISC-approved union wage rates to begin with. In short, separate is not equal.

Not only do we believe CLC policies discriminate against open shop contractors, but they are also confusing and inconsistent. Such failures on the part of CLC policies add to the noncompetitive position in which the CLC has placed open shop contractors.

One of the inconsistent policies has been to permit an open shop contractor which first enters an area to pay up to the CISC-approved union wage rates. At the same time, open shop firms located in that area are prohibited from using those same union wage rates. This discrimination against the local contractors is obvious. This error was also recognized by the CLC itself when it issued a correction recently, that permits the open shop contractor first entering an area to use wage rates paid by a majority of contractors in that area. The attempted correction of this inequity has also turned out to be a problem. Without some kind of administrative machinery, which does not exist, it would be impossible for anyone, including government administrators, to determine whether an open shop contractor entering an area is using the wage rates paid by a majority of contractors or not. The lack of a workable wage adjustment system for open shop contractors is certainly demonstrated by the above noted cases.

Similar problems result from the manner in which the CLC undertakes to relate itself to the Davis-Bacon Act wage determination processes and to the states' "little Davis-Bacon" wage determination processes. The general CLC rule has been to limit the Davis-Bacon wage determination increases to CISC-approved wage and fringe increases. The Davis-Bacon Section of the Labor Department tries to follow this policy. However, an inconsistent policy has been adopted for state wage administrators who are not required to limit their predetermined wage increases to those approved by CISC. Consequently, state wage determinations may inflate construction costs by recognizing higher rates than are permitted to be paid the contractors under CISC ceilings.

This inconsistency also permits wage problems to arise between state and Federal prevailing wage determinations by permitting a contractor performing such a state or Federally-involved project to pay excessive rates imposed by the state wage administrators to the disadvantage of other contractors.

Another unreasonable result arises from the CLC policy on Davis-Bacon rates. For example, contractors are required to pay the Davis-Bacon rates on Federally-involved contracts, but must cut back to their original wage rates after the Federally-involved contract has been completed. This is not a practical procedure. The CLC's response is to require a petition to be filed for permission to pay higher rates to obtain or retain essential manpower, which is also an impractical procedure.

Based on these and other procedural problems resulting from controls, the Board of Directors of Associated General Contractors, at our Midyear Board Meeting, held September 25-29, 1973, recommended that the AGC oppose the continuation of controls in the open shop portion of the constructional industry, if controls on other industries are dropped.

We submit these comments and respectfully request that when future hearings on the procedural aspects of controls are conducted that we be afforded the opportunity to testify; expanding our comments and responding to the questions of the subcommittee.

NOVEMBER 6, 1973.

STATEMENT OF ASSOCIATED BUILDERS & CONTRACTORS, INC.

This statement is filed on behalf of Associated Builders and Contractors, Inc., a non-profit incorporated association, on occasion called ABC. The Association, with its national headquarters in Maryland, has over 6,000 firms and individuals as members in over 40 states. The members are largely general contractors, sub-contractors and their suppliers. Most of the members would classify as small businessmen.

A major concern of the Association's members is presented by the current wage controls imposed on contractors. These controls affect the very survival of some contractors, especially those who are in the small business category. They feel strongly that in some respects wage controls as presently administered are anything but fair. The particular types of unfairness which concern them are set out hereinafter.

UNFAIRNESS OF THE LIMITATION OF 5.5 PERCENT

The actual working of the 5.5 percent maximum annual aggregate limitation on wage increases at times discriminates against non-union contractors. There is no such percentage limitation applied to unionized contractors. They are responsible to CISC and it is common knowledge that on occasion CISC has allowed a much greater increase to unionized employees. True, there is an exception which allows dollars and cents duplication for non-union construction employees of increases granted union construction employees performing the same or substantially similar work in the same local labor market area. What this exception does, however, is to perpetuate already existing differentials even if conditions of the market place, including the need to attract manpower, dictate that they should be eliminated. There is another exception which makes possible an added increase if the employer can prove its necessity to recruit or retain employees of a particular craft essential to the efficient operation of his business. There are two problems which confront those employers who would avail themselves of this last mentioned exception. First, to obtain approval of an increase based on this exception is time consuming, whereas time is frequently of the essence in construction contracts. So even if the increase is ultimately approved it may come too late to be really helpful. Furthermore, the contractors who need to use this exception are often small businessmen. They are likely not to be aware of their rights, or if they are, they hesitate to implement them because of the expense. Hence they are victimized by rules that favor the unionized contractor.

THE UNFAIR RULES REGARDING NEWLY CREATED JOBS AND ENTERING NEW LABOR MARKET AREAS

Under current regulations when a non-union contractor creates a new job or enters a new labor market area he is limited to payment of a wage rate no higher than that paid by a majority of contractors in the local labor market area. These rules impose serious handicap on the non-union contractor. In either situation he must attract manpower. If he has created a new job category he obviously must pay sufficiently high wages to attract necessary employees to the job. In a tight labor market a wage rate that reflects no more than the majority rate simply will not attract employees to the job. Similarly, if a non-union contractor goes into a new labor market area he almost surely will require local manpower. He usually needs it promptly because construction contracts normally have deadlines. His efforts to attract manpower promptly however are hampered by the requirement that he pay no more than the rate being paid locally by the majority. There is no incentive for employees to come to him because of such a rate. The same exceptions as those mentioned in connection with the 5.5 per cent limitation would be available with respect to creating new jobs and entering a new labor market area. Their inadequacy, already discussed as applied to the 5.5 limitation, would prevail also as to new jobs and new labor market areas.

The unfairness of these wage limitations on non-union contractors who would create new jobs or enter a new labor market area takes on further significance because unionized contractors are not so restrained. They, the union with whom they do business, and CISC have complete flexibility to make adjustments, unhindered by such rules as those applied to non-union contractors.

UNFAIRNESS AS APPLIED TO PUBLIC CONTRACTS

The non-union contractor also suffers when he bids successfully on public works under Davis-Bacon procedures. If the rate paid by the open shop employer is less than that fixed for the project he will be in the position of paying two rates—one to those employees on the public project and another rate to employees on private projects. This situation causes bad employer-employee relations. Furthermore, it causes problems when employees are transferred back to employment on private work after completion of the public project. Any necessary downward adjustments at that time are ruinous to employee morale.

It should also be noted that once Davis-Bacon rates are fixed for a job, if the union scale in the area is then allowed to rise, the open shop contractor, suddenly finding himself with a lower wage rate, cannot afford to risk bidding the job for fear he cannot attract necessary labor.

It is recognized that it is exceedingly difficult to rectify the mentioned inequitable situations. Release from controls of the non-union contractor in the small-business category is one possibility. As a small operator there is little danger his operation will intensify inflation. Those who deal with unions are in a different category. Powerful unions are always likely to force wages all too high without controls. Not so with the small non-union contractor. It would be equitable and in keeping with efforts to stop inflation if he were freed from controls.

It appears also that if a contractor is compelled to adjust wages in an area where he is to do public contract work he should be permitted if he so desires to effect such wage rates for private as well as public contract work in the area and to continue such rates after he completes his public contract work. Otherwise, he at times faces a most difficult employer-employee relations problem.

It is most assuring to know that this Subcommittee is studying wage and price controls. ABC has great reservations as to whether the program is on balance conferring any real benefits on the public. In any event as long as we have the program it is hoped that this Subcommittee will ascertain ways to improve it for the good of all.

STATEMENT OF NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS,
Washington, D.C., October 18, 1973.

Senator CHARLES MCC. MATHIAS, Jr.,
Subcommittee on Separation of Powers,
Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MATHIAS: The National Association of Wholesaler-Distributors (NAW) is a federation of 89 National wholesale trade associations which collectively have a membership of approximately 30,000 firms. Included within the membership of our constituent associations are the vast majority of those wholesaler-distributor firms subject to the Cost of Living Council's Phase IV regulations.

We are gratified that the Subcommittee on Separation of Powers is conducting what we believe is an urgently needed inquiry into the propriety and legality of the Cost of Living Council's procedures and policies. We ask that the comments which follow be made a part of the record of this proceeding.

We could dwell at length on enumerable inequities which the business community and our members have suffered as a result of the expediency which has characterized the Economic Stabilization Program. We will restrict our comments herein to but one of these however—the "retroactivity" of the Phase IV regulations—in order to focus on what we deem to be a total disregard of due process in equity and in law.

By "retroactivity" we mean the avowed policy of the Cost of Living Council of judging a firm's entire current fiscal year performance by the Phase IV regulations, as soon as a transaction is conducted above Adjusted Freeze Prices. This means that that portion of the year which was encompassed by the regulatory requirements of an entirely different Phase of the Economic Stabilization Program will be judged, after the fact for a good portion of that year, by the Phase IV regulations.

Firms which operate on a calendar year basis, as is generally true in our industry, will have been subject to four separate sets of price regulations by year's end. They operated under the constraints of Phase II for the first few days of January; Phase III was in effect until June 12th; the Freeze II regulations superseded the Phase III regulations on June 12th and remained in effect until August 12th; and finally the Phase IV regulations took effect, generally, on August 12th and, if one can presume that Phase V is not impending, will be in effect through year's end.

Each of these Phases had a distinct set of regulatory requirements. Each had different parameters as to what constituted compliance. Yet, the Cost of Living Council has now decided that, when taken as a totality for purposes of its ceiling on net profits and its ceiling on gross margins, a firm's performance for the entire calendar year 1973 must be in compliance with the Phase IV regulations. This retroactive application of the Phase IV regulations across the entire period January 1, 1973–December 31, 1973, if left unchallenged, establishes a dangerous precedent under which the Cost of Living Council may at any time promulgate regulations which have the effect of rendering actions which were fully within the Council's regulations at the time they were taken, retroactively illegal.

The implications of retroactivity are more than philosophical in nature. The hardships and inequities which are being caused by the current policy of retroactivity can easily be quantified in dollar and cents terms. While the examples of what this policy means for our nation's wholesaler-distributors are legion, we will offer only a single illustration of our point.

The Phase III regulations provided that wholesaler-distributors could increase their gross margins so as to reflect Government-mandated operating cost increases. This relief had been urgently sought by our industry inasmuch as the Phase II regulations had required wholesaler-distributors to absorb, without offset, all cost increases except for those in cost-of-goods sold. Many wholesaler-distributors availed themselves of this provision of the Phase III regulations.

The Phase IV regulations do not contain a provision allowing the reflection of such Government-mandated operating costs increases in our gross margins, which means that we must reduce our gross margins under the Phase IV regulations to the extent that they were increased during Phase III to offset such increases.

It would be one thing if this were all that were required of us to comply with the Phase IV gross margin regulations. However, the Phase IV regulations also require that wholesaler-distributors, by year's end, achieve a gross margin no greater than the annual gross margin achieved during 1972. 1972 was a period during which our industry was subjected to the Phase II regulations, which likewise did not allow a reflection of Government-mandated operating cost increases in our gross margins. The result is that, in order to stay within the Phase IV annual requirement, a firm which took advantage of what was its prerogative under the Phase III regulations, must now reduce its gross margin *below* the average gross margin obtained during 1972 and *below* the gross margin theoretically allowed by the Phase IV regulations so as to achieve an average gross margin by year's end no higher than that of 1972.

To analogize, this is as inequitable as a situation in which one drives down a 100 mile road for the first 50 miles at the legal speed limit of 60 miles an hour and covers the last 50 miles at the legal speed limit for this section of 40 miles an hour. At the end of the journey, the individual is given a ticket for speeding by the enforcement officials under the logic that his average speed was 50 miles an hour when the speed limit at the end of the road was only 40 miles an hour. To comply, the individual should, under this logic, have reduced his speed for the second portion of the journey to 20 miles an hour despite the fact that the posted legal speed limit was 40 miles an hour.

Cost of Living Council officials have repeatedly stated that voluntary compliance is a prerequisite to attainment of the goals of the Economic Stabilization Program. Any system of voluntary compliance must be predicated upon mutual confidence and fair play. The policy of retroactivity which the Council has chosen to follow clearly precludes the adoption of such an attitude on the part of the business community. Equity can only exist if the rules of the game are not changed and retroactively applied.

We urge you and your colleagues to do everything within your power to bring about a policy whereby compliance with the Economic Stabilization Program be predicated upon a principle of judging compliance for a given period of time

solely on the basis of the regulations which were in existence *at that time*. To do less is to endorse a circumstance in which knowledge of and compliance with existing law is no safeguard.

On behalf of our organization and its members, we wish to again thank you for your concern that the no longer "temporary" Economic Stabilization Program be administered under all applicable legal and procedural safeguards.

Sincerely,

DIRK VAN DONGEN,
Director of Administration.

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS,
Washington, D.C., November 20, 1973.

Mr. JAMES W. McLANE,
Deputy Director, Cost of Living Council,
2000 M Street NW.,
Washington, D.C.

DEAR MR. McLANE: Enclosed is a petition for rescission of those sections of the Phase IV regulations which retroactively subject actions taken prior to August 12, 1973 to the Phase IV regulations. In our petition, we request an immediate change of the current regulations so as to make the Phase IV regulations applicable only to those actions, whether individual or aggregate, taken after August 12, 1973.

There are no specific Cost of Living Council regulations setting forth procedures for petition for rescission or amendment of a Council regulation, although such procedures are required by the Economic Stabilization Act and pertinent parts of the Administrative Procedures Act. Our petition is based on those Statutes.

The retroactive application of the Phase IV regulations is highly inequitable; our attorneys advise us that such retroactive application is also patently unlawful. Because of the substantial injury being done to our industry by the Council's policy on this matter, we feel it incumbent to pursue all avenues of relief available to us. We thus request your expeditious consideration of and response to this petition.

Retroactive application of the Phase IV regulations extends to manufacturers, retailers, and the service sector as well as to wholesaler-distributors. Although we know that representatives of these sectors share our concern on this matter, we will limit our comments herein to the subject of retroactivity as it affects the wholesale distribution industry.

By making its regulations retroactively applicable, the Council has established a situation in which, once a wholesaler-distributor conducts a transaction above Adjusted Freeze Prices, the Phase IV annual RGM/CIPM and net profit constraints apply to the firm's entire current fiscal year, including that portion of the year during which the firm made pricing decisions under the Phase III guidelines.

Inasmuch as a majority of the firms in our industry are on a calendar year basis, retroactive application of the Phase IV regulations means that a majority of their current year will be subject to the Phase IV regulations despite the fact that they did not even exist until the middle of the eighth month of this year. For those firms having fiscal years ending after August 12, 1973, but prior to December 31, 1973, the period to which the regulations will be retroactively applied is even greater than that for calendar-year firms.

Cost of Living Council officials with whom we have discussed this matter have advanced the belief that because the regulations give wholesaler-distributors the option of remaining at Adjusted Freeze Prices and thus not triggering the annual limitation on a retroactive basis, the regulations are really not retroactive. We submit that this position is completely contrary to the facts and that the effect of the regulations is actually retroactive.

The impact of this policy of retroactivity is such that wholesaler-distributors do not really have a choice as to whether they can sell above Adjusted Freeze Prices or not—not under a policy where this decision must be made based upon actions already taken in the period prior to the introduction of the Phase IV regulations; actions which, it should not be overlooked, were totally within the regulations of Phase III. In fact, the real-world effect of this policy is simply to deny a large number of firms in our industry the cost recovery supposedly available to them under the Phase IV regulations, despite the fact that their costs of doing business, including increases in the cost of goods sold, are increasing, in many instances, dramatically.

The policy of retroactivity results in a retroactive rescission of the Phase III price and profit rules, a course of action which the Council rejected in its recently promulgated Executive and Variable Compensation Regulations. In these regulations, the Council addressed itself to the question of retroactively subjecting plans or practices newly adopted during Phase III which affect the compensation of members of the Phase IV created Executive Control Group to requirements that new plans be submitted to the Council for approval and determination of a base year amount. In order to avoid what the Council itself stated, "In effect . . . may have constituted a retroactive rescission of the Phase III rules . . .", the Council incorporated provisions in these regulations stating that plans or practices of the type described above will not be required to be submitted to the Council for approval and shall not constitute a violation of the Act.

Wholesaler-distributors which have a fiscal year ending during the period August 12, 1973–December 31, 1973 (which, as we have noted above, would be the vast majority of the firms in our industry) will have been subject to four separate sets of profit and price regulations by year's end. They operated under the constraints of Phase II for the first few days of January; Phase III covered their pricing actions until replaced by the Freeze on June 12; and finally the Phase IV regulations took effect for our industry, generally, on August 12, 1973.

Each of these "Phases" has had a distinct set of regulatory requirements. Each had different parameters as to what constituted compliance. Yet, the Cost of Living Council has now decided that, when taken as a totality for purposes of its ceilings on net profits and its ceilings on CIPM's/RGM's, a firm's performance for its fiscal year ending prior to August 12, 1974, must be in compliance with the Phase IV regulations.

The Council has thus given itself the ability to promulgate, at any time, regulations which have the effect of rendering actions which were fully within the Council's regulations at the time they were taken, retroactively accountable under a completely different set of rules. This places the wholesaler-distributor in the economically untenable position of selecting between remaining at Adjusted Freeze Prices or of subjecting actions during and under Phase III to the Phase IV regulations.

The result is that many wholesaler-distributors cannot exercise the cost recovery prerogatives which exist in the Phase IV regulations. They must remain at Adjusted Freeze Prices so as not to trigger the retroactive application of the Phase IV regulations.

To analogize, this is as inequitable a situation as one in which one drives down a 100 mile road for the first 50 miles at the legal speed limit of 60 miles an hour, and covers the last 50 miles at the legal speed limit for this section of 40 miles an hour. At the end of the journey, the individual is given a ticket for speeding by the enforcement officials, under the logic that his average speed was 50 miles an hour when the speed limit at the end of the road was only 40 miles an hour. To comply, the individual should, under this logic, have reduced his speed for the second portion of the journey to 20 miles an hour despite the fact that the legal posted speed limit was 40 miles an hour.

It is respectfully urged that expeditious and favorable action be taken on this petition so as to avoid irreparable harm and injury to the wholesale distribution industry.

Sincerely, .

DIRK VAN DONGEN,
Executive Secretary.

Enclosure.

PETITION OF NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS TO THE COST OF LIVING COUNCIL FOR RESCISSION OF CERTAIN REGULATIONS WHICH RETROACTIVELY APPLY PHASE IV STANDARDS

RELIEF SOUGHT

1. Petitioner is requesting an immediate rescission of the retroactive policy of the Cost of Living Council, as incorporated in its regulations, subjecting actions taken prior to August 12, 1973 to Part 150—Cost of Living Council Phase IV regulations. Such regulations subject a wholesaler-distributor's entire first fiscal year ending prior to August 12, 1974, to the Phase IV annual ceiling on Realized Gross Margins/Customary Initial Percentage Markups and its ceiling on annual net profit margins as soon as the firm conducts, after August 12, 1973, a trans-

action above Adjusted Freeze Price levels. Thus, once a wholesaler conducts a transaction above Adjusted Freeze Prices, the Phase IV annual RGM/CIMP and net profit margin constraints apply to the firm's entire fiscal year, including that portion of the year during which the firm made pricing decisions under Phase III guidelines.

A majority of the firms in the wholesale industry are on a calendar year basis. Of the minority of firms not on a calendar year basis, many have fiscal years which end during the period August 12, 1973–December 31, 1973. Therefore, retroactive application of the Phase IV regulations means that a majority of these firms' current year will be subject to the Phase IV regulations which did not come into effect until the middle of the eighth month of 1973. We therefore are requesting that the regulations be immediately made applicable only to those actions, whether individual or aggregate, taken after August 12, 1973.

PETITIONER

2. The National Association of Wholesaler-Distributors (NAW) is a federation of 89 national wholesaler-distributor associations. Represented within the membership of the constituent organizations are the preponderant majority of wholesaler-distributor firms in the nation which are subject to Phase IV. The attached copy of the 1973 NAW Annual Directory provides additional information on the organization.

PROCEDURE

3. This petition is brought under Section 207(b) of the Economic Stabilization Act, which provides, in part,

"Any agency authorized by the President to issue rules, regulations, or orders under this title, shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking . . . rescission of . . . such rules, regulations, and orders."

and Sec. 553(e) of the Administrative Procedure Act which provides:

"Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

Petitioner hereby exercises its prerogative under these sections to seek appropriate and timely relief.

FACTUAL BACKGROUND

4. Petitioner has vigorously and consistently opposed said retroactive application beginning with its formal written submission on the proposed Phase IV regulations to the CLC Executive Secretariat on July 31, 1973, and by numerous informal protests and discussions with the CLC staff after issuance of the final Regulations on August 7, 1973. To date, the CLC has simply reaffirmed its policy to retroactively apply its regulations.

5. Section 150.11(c) of the Phase IV regulations states, in part, that

"... a firm which, ... with respect to its ... wholesaling activities, charges a price for an item in excess of the Adjusted Freeze Price for that item in any fiscal year, may not for the fiscal year in which the price increase is charged, exceed its base period profit margin."

Section 150.304 in Subpart K, which applies to wholesalers and retailers, provides, in part, that

"... a firm which increases the prices for any item above the Adjusted Freeze Price for that item must control the prices it charges for the category in which the item falls so that . . . (2) For any fiscal year the Customary Initial Percentage Markup applied to that category or the Gross Margin realized for that category does not exceed the Customary Initial Percentage Markup or the Gross Margin realized for that category during the pricing base periods; and (3) the firm's profit margin for any fiscal year in which the increased price is charged does not exceed its base period profit margin . . ."

6. The retroactive application of the annual net profit and CIMP/RGM ceilings which is implicit in the above quoted sections of the Council's Phase IV regulations has been made explicitly clear in the following quote from the Council's Phase IV Question and Answer List Number 10 which was issued on August 29, 1973:

Q. Section 150.304 of the Phase IV price regulations states that a retailer or wholesaler may not increase prices for any item within a merchandise category above adjusted freeze prices if the gross margin or customary initial percentage

markup for that category for the full fiscal year will exceed the customary initial percentage markup or gross margin for the pricing base period. Does this requirement apply if part of the fiscal year occurred prior to the inception of Phase IV?

A. Yes. Under the Phase IV price regulations, a retailer or wholesaler is eligible to raise prices after August 12, 1973 above adjusted freeze price levels only if in addition to fulfilling other requirements stated in the regulations its customary initial percentage markup or gross margin for merchandise category involved for the fiscal year which includes August 12, 1973 does not exceed the CIPM or gross margin for that category as established during the pricing base period.

7. The Council has established a situation in which, once a wholesaler conducts a transaction above Adjusted Freeze Prices, the Phase IV annual RGM/CIPM and net profit margin constraints apply to the firm's entire current fiscal year, including that portion of the year during which the firm made appropriate pricing decisions in accordance with the Phase III guidelines.

The effect of this policy is to deny what information reaching us shows is a substantial proportion, if not a majority, of firms in the wholesale distribution industry the cost recovery supposedly available to them under the Phase IV regulations, despite the fact that their costs of doing business, including increases in cost of goods sold, are increasing, in many instances, dramatically.

8. The inequitable burden placed upon wholesaler-retailers by the regulations creates an immediate need for relief to prevent irreparable harm and injury.

EXAMPLES OF RETROACTIVE EFFECTS

9. Specific illustrations of some of the retroactive effects of the above cited regulations are as follows:

(a) The Phase III regulations provided that a firm could increase its prices by a 1.5% weighted average above those prices lawfully or authorized to be in effect on January 10, 1973 without triggering any gross margin or net profit constraint. A substantial number of wholesalers elected to operate under this provision of the General Price Standard and accordingly, established their pricing policies. This provision in the regulations was consistently explained by Council officials as an inducement to companies to hold the line on prices so as to avoid any ceiling on their gross or net margins. The retroactive application of the Phase IV regulations means that the acceptance of the constraints contained within this inducement now penalizes a firm which operated within these constraints.

(b) Wholesaler-distributors not opting to use the 1.5% weighted average increase approach were instructed in the Phase III General Price Standard to refer to the policies and practices contained in the Price Commission's Phase II regulations. The Phase II regulations placed a ceiling on wholesaler-distributor CIPM's which was to be applied on an item-by-item basis unless the firm could demonstrate that it was a category pricer. The majority of firms in the wholesale distribution industry were and are item-by-item pricers and as such were constrained not to exceed the CIPM on each item in their inventory. Many firms which operated under the Price Commission's regulations during Phase III now find themselves in a situation in which as of August 12, 1973, their category CIPM's/RGM's for the year to date exceed those allowed by the Phase IV regulations, despite full compliance with the Phase III regulations because the Phase IV regulations changed the rules of the game from an item to a category basis of compliance measurement.

It should be noted at this point that the Council has made it specifically clear in its regulations that, although an item-by-item pricer,

"... may continue to price on that basis: ... the firm must comply with the Customary Initial Percentage Markup rules applied on a category basis."

(c) The Phase II regulations provided that a wholesaler-distributor could select, at his option, either his last CIPM prior to November 14, 1971 or, at his option, the markup utilized during his last fiscal year fully completed prior to August 15, 1971.

Firms opting to use the Price Commission's regulations as guidance during Phase III, continued to use these markups. However, the definition of CIPM contained in the Phase IV regulations is such that the lawfully allowable markup under Phase IV is the weighted average markup achieved in each merchandise category. The net result is to impose on those wholesaler-distributors which had a range of markups during the Phase II markup base period, markups below those achieved in an item-by-item basis during Phase II.

This results in a situation where the markups achieved during that portion of this year which was encompassed by Phase III are higher than the Phase IV annual limitation as a result of the weighted average computation concept of Phase IV. This again places the wholesaler-distributor in the position of simply having to remain at Adjusted Freeze Prices to avoid the retroactive judging of the pre-August 12th period.

(d) The Phase III General Price Standard provided that,

"Adjustments in excess of the Standard may be made only as necessary for efficient allocation of resources or to maintain adequate levels of supply."

Despite attempts by members of the industry and of the staff of NAW to determine from the Council the meaning of this provision and the amount of latitude which it conveyed, they were repeatedly told that, because Phase III was "self-interpretive" and "self-administered", each company must make a determination on its own as to the applicability of this and other provisions of the regulations to its circumstances.

Phase II had resulted in severe distortions in both prices and in the availability of the products handled by the industry. In many instances the product was not available at all or available only in limited quantities as a result of the limitations imposed on the suppliers' price increases by the Phase II regulations. Many of these suppliers acted during Phase III to restore supply/demand equilibrium, under the "adjustments in excess" provision and raised their prices substantially. Wholesalers followed apace as the market mechanism worked to bring about a restoration of equilibrium, and, again, as a result temporarily exceeded during Phase III the Realized Gross Margins of the Phase IV pricing base period.

(e) The Phase III regulations allowed wholesaler-distributors to increase their CIPM's to reflect Government-mandated operating cost increases.

This relief had been urgently sought by the industry. The Phase II regulations had required wholesaler-distributors to absorb, without offset, all cost increases except for those in cost of goods sold. The allowance for recovery of Government-mandated operating cost increases provided a measure of relief from rising operating costs which was urgently needed and many wholesaler-distributors availed themselves of this provision of the Phase III regulations.

The Phase IV regulations do not contain a provision allowing recovering of Government-mandated cost increases; rather they require the utilization of CIPM's/RGM's from the pricing base period, which was encompassed by the Phase II regulations. This means that wholesaler-distributors who increased their markups during Phase III, must, under Phase IV, reduce them by the amount to which they increased them to reflect Government-mandated operating costs.

It would be one thing if this were all that were required of wholesaler-distributors to comply with the Phase IV CIPM/RGM regulations. However, the Phase IV regulations also require that wholesaler-distributors achieve a CIPM/RGM by year's end no greater than the CIPM/RGM achieved during the pricing base period. As we have noted above, the pricing base period is encompassed by Phase II, which did not allow reflection of Government-mandated operating cost increases in CIPM's. The result is that, in order to stay within the Phase IV annual CIPM/RGM ceiling, a wholesaler-distributor which took advantage of what was its prerogatives under the Phase III regulations must now reduce its gross margins below the allowable margin derived from the pricing base period and thus below the CIPM/RGM theoretically allowed by the Phase IV regulations so as to achieve an average CIPM/RGM by year's end no higher than that of 1972 or, again, remain at Adjusted Freeze Prices. To illustrate, assume a gross margin of 10% during Phase II which was increased to 10.2% during Phase III under the Government-mandated operating cost allowance provision. The Phase IV regulations require, first, a reduction of gross margin from the 10.2% allowed during Phase III, to the 10% allowed during Phase IV. But beyond that, in order to be in compliance with the annual constraint, the firm must reduce its current gross margin below 10% so that when averaged with the 10.2% utilized during the period of the current year encompassed by Phase III, the firm will not have exceeded the Phase IV 10% annual constraint.

In other words, although the regulations allow a theoretical 10%, the practical impact is such that, in this instance, the wholesaler-distributor must reduce his margin below 10% to be in compliance.

(f) During Phase II and Phase III, for those wholesalers opting for the other than 1.5% approach, the markup constraint was applied on a CIPM basis.

The Phase IV regulations contain an option allowing the wholesaler-distributors to control themselves on either a CIPM or RGM basis. Although no criteria for choosing between the two are contained in the regulations, the Council has, in a recent Question and Answer, made it clear that many firms in the industry will be required to utilize the RGM approach during Phase IV. This means, if they sell above Adjusted Freeze Prices, after August 12, 1973, pricing actions made on a CIPM basis during that portion of the current fiscal year prior to August 12, 1973, are now subject to Realized Gross Margin constraints derived from 1972.

(g) During Phase II and Phase III, when item-by-item control existed, shifts in product mix did not have an impact as regards compliance with the CIPM ceiling. However, under the Phase IV category controls, shifts in product mix which have occurred since the pricing base period can be substantial enough that it is entirely possible for a company to have already pierced its CIPM or RGM category ceiling prior to August 12, 1973, despite its adherence to the Phase III item CIPM ceilings. This is a particularly relevant circumstance inasmuch as shortages of inventory readily available during Phase II have been widespread throughout 1973. NAW recognizes the fact that the Phase IV regulations do contain a provision stating that the Council may excuse overages resulting from inadvertent shifts in product mix. The problem is, of course, that this is a permissive clause as regards actions which the Council may or may not take on an individual basis and provides no definitive, immediate guidance which can be relied upon by a company which has had a shift in product mix occur since its pricing base period.

(h) Phase III continued the Phase II Small Business Exemption of Phase II. The Phase IV regulations also continue the SBE concept, but change the dates on which a company is to determine its average number of employees. The net result of this is to impose, effective August 12, 1973, controls on firms which qualified for the Phase II Small Business Exemption but as a result of having expanded their work force are now disqualified under the new computation dates of Phase IV. Such companies are faced with a situation in which their performance during that period of the current fiscal year preceding August 12, 1972 was not subject to the Phase III constraints. Yet, under the Phase IV regulations, as soon as such a firm conducts a transaction above Adjusted Freeze Prices, its pricing actions during the period preceding August 12, 1973, are subject to the annual Phase IV RGM/CIPM and net profit margin ceilings.

ILLEGALITY OF RETROACTIVITY

10. The aforementioned attempts to make the regulations effective retroactively are manifestly unfair and patently unlawful. While we would hope that the Council will see fit to eliminate by administrative action retroactive application of its regulations as a matter of equity, we feel it necessary to bring the following legal considerations to the Council's attention in the event that the equity argument does not sway the Council from its present course.

The retroactive application of price controls affects vested and contractual rights, violates due process and seriously impairs fundamental constitutional rights. Courts have regularly refused to give retroactive effect to rules and regulations in such circumstances. During World War II, price control regulations specifically provided that there would be no retroactive liability for action taken before a change in the regulation, and the courts consistently upheld this fundamental principle of non-retroactivity. There are a series of cases wherein the courts have ruled that laws creating liability in a transaction retroactively are presumptively invalid as oppressive.

There is no question that the retroactive effect of the Phase IV regulations brings such regulations into that same category. The effect of the regulations is to impose a substantial inequity on the regulated, notwithstanding the fact that the regulated have in good faith exercised their rights under the previous regulations under which they have been bound. This is an oppressiveness which numerous courts have refused to permit to stand, and which the petitioner is confident will not be permitted to stand.

Such an effect acts to deprive the regulated of due process and is clearly violative of constitutional rights. Due to the criminal sanctions of the Economic Stabilization Act of 1970 and the regulations issued thereunder, prosecution may be brought for ex post facto violations of Phase IV regulations, a result clearly prohibited by the Constitution. Thus, the regulated have a choice of remaining at Freeze II price levels despite increasing costs or being subjected to criminal or civil penalties and contesting such penalties as a violation of their constitu-

tionally guaranteed rights. This is an inequitable and unfair imposition on the regulated and one that is contrary to law.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays that, in order to eliminate the irreparable harm and injury presently being suffered by the wholesale distribution industry, the Cost of Living Council take prompt and expeditious action on this petition by modifying the Phase IV regulations so as to limit their applicability to only those actions, whether individual or aggregate, taken after August 12, 1973; and that in implementing this modification, the following specific modifications be made in its regulations:

1. Sec. 150.1—Scope. Paragraph (a), Line 3: After the word, "price", and before the word "rules", insert "and profit margin".

2. Sec. 150.1—Scope. Paragraph (a), Line 4: Insert after the word, "chapter," and before the word, "effective," "(which are the regulations applicable to transactions occurring prior to 11:59 P.M. e.s.t. August 12, 1973)".

3. Sec. 150.11—Profit Margin Limitation. After paragraph (a), add a new paragraph (b) to read, "Any portion of a fiscal year occurring prior to the effective date of this part shall be subject to Section 130.13 and Section 130.57 (a), (b), (c) and not to this part".

4. Sec. 150.304(c) (1), Line 1: Cancel "For any fiscal quarter" and substitute therefor "For that portion of any fiscal quarter ending after 11:59 P.M. e.s.t. August 12, 1973".

5. Sec. 150.304(c) (2), Line 1: Cancel "For any fiscal year" and substitute therefor, "For the portion of any fiscal year after 11:59 P.M. e.s.t. August 12, 1973".

6. Sec. 150.304(c) (3), Line 1: Cancel "any fiscal year" and substitute therefor "the portion of any fiscal year after 11:59 P.M. e.s.t. August 12, 1973".

7. And that the regulations be modified in any and all instances not specifically identified above so as to bring them into full conformity with the adopted policy of non-retroactive application.

Respectfully submitted.

DIRK VAN DONGEN,
Executive Secretary.

STATEMENT OF MACHINERY AND ALLIED PRODUCTS INSTITUTE

MACHINERY AND ALLIED PRODUCTS INSTITUTE,
Washington, D.C., October 17, 1973.

HON. CHARLES MCC. MATHIAS, Jr.,
Subcommittee on the Separation of Powers, Committee on the Judiciary,
Washington, D.C.

Re Administrative Procedure of the Wage-Price Program.

DEAR MR. CHAIRMAN: At the outset, we would like to commend you and the Subcommittee for holding these hearings on the procedural fairness of the wage-price control program. As we understand it, your initial inquiry is concentrating on the exception procedure and the procedures, such as they are, for clarifying rulings issued under the program. We think this is a very necessary inquiry and one that is of critical importance if wage and price controls are to remain with us for any significant period of time.

As I believe you know, the Machinery and Allied Products Institute represents the capital goods and allied equipment manufacturers in the United States. This sector of the economy, whose effective operation is vital to increased productivity and the alleviation of shortages of supplies, has been discriminated against in very significant ways by the Administration in the design and implementation of wage and price controls. In fact, in light of its contribution to the amelioration of inflation, it is ironic that the government maintains the controls for this segment of the economy. Restated, in terms of the war against inflation, a principal weapon has always been the purchase of new and more modern equipment and plant to improve productivity and increase output.

Mindful of the focus of your current inquiry, we will limit our comments to the experience the capital goods companies have had in terms of what might be called procedural fairness under these control programs, with major emphasis on the price side. Our views cover three points: the matter of certainty or pre-

dictability; the problem of vague substantive standards; and the communication breakdown. We turn first to the matter of certainty or predictability.

CERTAINTY OR PREDICTABILITY

As your Subcommittee is aware, in the business world a premium is placed on the ability to plan for the future with enough certainty to make major commitments of capital and manpower. This need for certainty affects all business, large and small—only the magnitude of the risk changes as a result of size. Unfortunately—and to some extent, perhaps unavoidably—the control program initiated in August 1971 has been noteworthy for its unpredictability. Although we are in the third year of controls, the Administration has vacillated from a freeze, to a tough mandatory program, to a vague “voluntary” program, back to a freeze, and on into a new and tougher program. In each phase, the rules changed significantly. The result, of course, for all companies covered by the program is almost a total inability to plan ahead. We recognize, as does the Cost of Living Council, that operating in an economy as diverse and complex as ours, controls are bound to produce countless dislocations and anomalies, but we think the Council fails to recognize the companion proposition that even inadequate rules can be coped with by industry if they are consistently applied over a period of time. In short, in the administration of controls, a premium should be put on consistent standards which are comprehensible and afford reasonable predictability under proper administrative procedures and an adequate review mechanism. It was largely because of the pressing need for consistency that, during the discussions of alternative Phase IV approaches, the Institute stressed the point that, failing decontrol, a return to Phase II in whole or in major part would be the best approach for the “controllers.” Unfortunately, the Administration elected to do otherwise.

This need for consistency, whether in terms of administration or the standards which control, is apparently very difficult for many elements of government to comprehend. Although we believe there is general recognition of industry's long-term and short-term planning cycles, we think that there has been a tendency to overlook the latter in order to achieve what apparently has been a series of short-term goals. No doubt this was the result, at least in part, of the Administration's and even Congress'—in light of the pattern of one-year extensions of the basic statute—implied dictates that each phase of controls be designed in a way to return us as quickly as possible to the free market system. We certainly do not advocate permanent controls as a means to ensure certainty. However, if we are not to return soon to the free market system, the considerations leading to these hearings, namely, the need for operating under accepted standards of fairness, should be given a high priority in terms of the substantive and procedural operation of the program. Perhaps our point in this regard can best be made with a few examples.

Price rollback.—When the proposed rules were issued for Phase IV, government officials announced that no rollback of prices was intended. Also, during the press conference to announce the issuance of the final Phase IV regulations, the General Counsel of the Cost of Living Council indicated that the term “adjusted freeze price” was to carry forward the notion “contained in the draft regulations of, essentially, grandfathering in existing prices.” At the start of Phase IV, anyone would have fully expected, in light of these policy pronouncements, that prices lawfully established at least prior to the freeze were protected in terms of being starting points for doing business during Phase IV. Unfortunately, as a close examination of the rules reveals, this is not the case. The government, by changing critical definitions, including the definition for “transaction,” has actually imposed what, for many companies, is a substantial rollback of prices. (Our views on this problem are discussed in greater detail in the attached statements of August 23 and September 11 originally submitted to the Cost of Living Council.)

We understand that the Cost of Living Council is currently exploring various avenues of relief and we think it imperative that some relief be promptly forthcoming. In this connection, we are most appreciative for the opportunity presented by the Cost of Living Council to present our views. Our principal purpose here in citing this as an example of uncertainty is that nothing creates more uncertainty than regulations designed to implement major policy decisions that, in fact, do not implement them. In our view, this is not only a substantive breakdown, but is a procedural one as well. Restated, while we recognize that

controls are designed to interfere directly with economic behavior and that dislocations and distortions are inevitable results of that process, we expect that any doctrine of fairness would dictate that unintended dislocations and distortions should be promptly remedied, particularly under a control program which is premised on a "need" for *flexibility* to respond to changes in the economy.

Retroactivity.—Another factor which has created uncertainty during the life of the control program are the retroactive rulings which have followed each change in the type of controls imposed. For example, Phase IV has eliminated a company's right to utilize previously authorized price levels established under earlier control periods. Viewed in practical terms, this is a retroactive action by the Council. To explain more fully, during Phase II, a typical company had the right to raise prices without consultation or review by the government under one or more of the following conditions:

1. Its prices were below Phase II base prices.
2. Its prices were below price levels established on May 25, 1970.
3. Its prices were below those authorized and approved by the Price Commission, i.e., the company did not fully put into place a price increase authorized and approved by the Price Commission.

In planning ahead, of course, a company would have had every reason to expect that at any time in the future it would be able to move to these authorized price levels. However, under the Phase IV rules, a company no longer has the right to move to these price levels.

Stripped of its impact in terms of inflation—and obviously the removal of the right to increase prices to a previously authorized level, conceptually at least, will dampen inflation—the approach has some obvious shortcomings. For example, in our view, this kind of approach is tantamount to telling companies that, if they elected to live with the spirit of controls, namely, they held back from increasing prices even though higher prices were authorized, they became "double losers" in the next control period. In the vernacular, this means "the good guys are going to get the harsh treatment and the bad guys are going to get the rewards."

When is a ruling not a ruling?—During Phase II, the Price Commission, the Pay Board, and the Cost of Living Council combined issued over 500 rulings. While many of these rulings are no longer germane because certain segments of the economy have been removed from controls, and the program has adopted new and more demanding regulations, early in the life of Phase IV, the Cost of Living Council announced, via a Question-and-Answer List, that the IRS rulings issued during Phase II were not legally binding during Phase IV. More fully, the Council stated:

"Phase II rulings may be used for informative guidance, but are not legally binding. Necessary legal interpretations of Phase IV regulations will be issued by the Cost of Living Council."¹

To date, the Council has not published a single ruling regarding Phase IV with the exception of price orders.

The uncertainty generated by a change in substantive standards is compounded and aggravated for those who are controlled when they cannot even rely on previous rulings for that portion of the regulations which remains unchanged. The "guideline" is, on its face superficial and almost self-contradictory: namely, that Phase II rulings provide a company with informative guidance, but have no legal substance. To make matters worse, nothing has been provided to take the place of these earlier holdings.

Profit control.—As a major aspect of the government's approach to controlling prices, the program has, since the start of Phase II, contained severe restrictions on profit margins. It will be recalled that in Phase III some relief was provided, but only minimal relief for many. The efficacy of the profit margin restraint approach is, we think, limited to a short-term type control program. This is because any selection of a base period inevitably disadvantages some. This is simply the nature of the base period concept. As it turns out, the base period was particularly bad for many firms in capital goods industries because they were suffering a business downturn—in some cases of the magnitude of a severe recession—during the years just prior to the advent of the freeze in 1971.

We urged, in Phase II, that there be recognition that the profit margin restraint rule should be modified if the program were to continue for any length

¹ Phase IV Question-and-Answer List No. 8, CLC-367, August 20, 1973.

of time. As we noted above, some relief was provided in Phase III, but as we go into the third year of the program, no further changes have been made. We think there must be recognition of the fact that such a restraint becomes more and more inequitable as the controls program is extended. In short, it would seem incumbent on the government, in terms of any standard of fairness, to provide relief, be it through an exceptions process or whatever. Obviously, the uncertainty as to availability of relief can totally distort a company's planning process and force it to make decisions which will not be in the best interest of the economy as a whole. We have in mind the necessity for certain companies to drop product lines because they are not in a position to get price relief due to the profit restraint rule. This is an excellent example of the distortions and misallocations which flow from controls and we would hope that Congress, if it extends the statute once again, would certainly bear this in mind in terms of any directions given to the Cost of Living Council.

As a final comment on this problem of predictability, we believe there are procedural mechanisms which can be employed which would avoid much of the uncertainty that these control programs have created. We will turn to some of these mechanisms in our recommendations below.

VAGUE STANDARDS

We, of course, recognize that the job of designing reasonable rules and regulations to govern wage and price behavior in an economy as complex as ours may, in the final analysis, be an impossible task. Clearly the Cost of Living Council understands the magnitude and difficulty of its responsibility. It certainly has underscored the need for broad rules, flexibility in the system, and prompt decision making. Nonetheless, here we are in the third year of controls and we still have a persistent and nagging problem of vague and undefined standards and rules. We would like to cite a few examples. Under Phase II, a general problem area was the pricing of long-term contracts, including government contracts. In effect, this critical problem area has never been dealt with in terms of either an exemption or specific rules. We do not wish to belabor the point, but it does appear to us that a period of more than two years is long enough to give any government agency ample opportunity to provide guidance and equity in one form or another.

Wage control.—Nowhere is the evidence of vague standards better illustrated than in the wage control portion of the program. There are perhaps as many interpretations of what the current wage standard is as there are people of whom you can ask the question. All that can be said is that the 5.5 percent standard is apparently designed to mean one thing in the collective bargaining situation, another for the non-unionized members of the labor force, and, with the issuance of at least proposed rules, quite another for top executives in industry. We think we understand why we have a vague standard governing wages. It is undoubtedly designed to establish a control which will not distort or overly restrict the general upward movement of wages and salaries. Yet, in fact, this has never been admitted officially. Since January 10, 1973, there seems to be a deliberate pattern of silence on the part of government with regard to the intent of the vague standard. We are not, *per se*, against the promulgation of this vague standard, but we do believe that it is incumbent upon government to at least provide the rationale and to ensure that what is vague for one is vague for all. No other approach can possibly achieve a minimum standard of fairness.

LACK OF COMMUNICATION

We turn now to the problem of lack of communication. As noted above, during Phase II over 500 rulings were published to explain complex rules governing wages and prices. As was also noted, since Phase IV started, no such rulings have been issued—or, at least, rulings of a comparable nature. It now appears that the principal approach to the interpretation of the complex Phase IV rules is to be a combination of questions and answers issued by the Council in a press release format and informal verbal exchanges between a member of the public and a member of the staff of one of the layers of the program's administration. We recognize that an effort is being made by these means to provide consistency in such interpretation and that thousands of questions have been answered and, in some cases, promptly so. However, from the point of view of procedural fairness, the approach adopted in Phase IV falls far short of the minimum requirements. Any program, and particularly one which is designed to perform

the difficult task assigned to the controls program, must build in a network of communication techniques to make available adequate knowledge of the regulations. The techniques are not new to government and, as a matter of fact, are almost universally utilized in major ongoing federal programs. They include the following, among others:

1. A rulings and interpretation branch.
2. Proper utilization of the public hearings process.
3. A viable exceptions and exemptions provision.
4. An administrative framework which builds on past experience.

Unfortunately, while the Cost of Living Council pays "lip service" to providing the equivalent of the items noted above, in any important sense, these communications are absent. For example, as noted above, no rulings have been formally published and the status in terms of legal defense of the "questions and answers" lists has never been made clear. While public hearings have been held regarding individual company or industry price increase requests, they have not been held with regard to rule making and, if we read the General Counsel's statements correctly, it is not intended that this approach will ever be utilized in the development of regulations.

Since Phase IV began, the Council has made public its actions on only a handful of exception requests. The public was told that, as one of the fundamental policies of Phase IV, a more viable exceptions program would be instituted because we were going into a "toughened" control period. Hopefully, this will eventuate, but we have no evidence that this is the case. Parallel to exceptions and exemptions is the concept of decontrol. Decontrol has, of course, been stressed as the end result of Phase IV. However, to our knowledge, the Council has not given even minimum consideration to an approach, criteria, or technique for accomplishing this announced goal.

As to a viable administrative framework, the government abandoned the approach set up in Phase II in favor of a new approach. We have reference to the decision to extend new authority and responsibility to the IRS for the operation of Phase IV. Obviously, this satisfies certain cost restraints—self-imposed or otherwise—of the government and has superficial respectability in the sense that the IRS has had a role to play in the administration of controls since the outset of the program in August 1971. However, what is unstated, but obviously could not be overlooked, is that, first, the Price Commission during Phase II established an internal system of price control which, by January 10, 1973, was operating in a relatively efficient fashion. Many government price analysts had survived the learning curve and were operating in the fashion of experienced officials. If we read the General Counsel's statement clearly, we are told two days' training is all the background an IRS price analyst needs to effectively make decisions regarding a company's request for a price increase. This obviously cannot be the case. Second, as recognized by the Council, the delegation of authority and responsibility in the magnitude given to IRS under Phase IV brings with it the obvious problem of inconsistent interpretation. No doubt the Council is aware of this problem and is working to minimize this result. Nonetheless, being forewarned and aware of the problem should have led the Council to adopt a system which, at least procedurally, did not build in this element of risk. In short, since the government must have known it could not avoid inconsistent interpretations as a result of delegating additional authority and responsibility to the IRS, it should have sought an alternative mechanism.

RECOMMENDATIONS

The ideal solution of the problems we have enumerated in this statement would be a return to a free economy. As we mentioned at the outset of this statement, it is simply ironic that the capital goods industries have been controlled for so long since the industries making up the capital goods sector of the economy do not contribute to inflation and, in fact, produce the type of equipment that is necessary for increased productivity and output. Hopefully, when this Committee completes its study, it will have noted misallocations and dislocations sufficient to warrant a congressionally mandated return to a free economy.

Barring an immediate return to a free economy, we think as the purpose of these hearings suggests, steps must be taken by the Administration to offset the distortions this program is currently creating. One obvious approach would be a viable exceptions process where speedy and adequate relief can be provided. We have in mind the necessity for an exceptions process which recognizes inequities

and hardships without forcing a company to be bankrupt or a critical supply shortage to be upon us before relief is provided. One of the problems we see as controls wear on is that the program is likely to create critical supply shortages in certain areas three or four years down the road because of some of the decisions forced upon companies today. It is to this kind of long-run problem that an exceptions process must be addressed.

* * * * *

Again, we appreciate the opportunity to present our views to this Committee and request that this statement be included in the record of the hearings. We think this Committee's inquiry is an essential one and hope that if we can provide further assistance, you will call on us.

Respectfully,

CHARLES STEWART,
President.

Enclosures.

MACHINERY AND ALLIED PRODUCTS INSTITUTE,
Washington, D.C., August 23, 1973.

Re price rollback imposed by phase IV controls.

Mr. JOHN T. DUNLOP,
Director, Cost of Living Council,
Washington, D.C.

DEAR MR. DUNLOP: In carefully studying the Phase IV regulations published in the *Federal Register* of August 9, we were greatly disturbed to find that the final regulations impose a substantial rollback of prices for the capital goods industries. This regulatory imposition of a rollback is entirely contra to the policy position announced at the time the outline of Phase IV was presented to the public on July 18. It is also at odds with views expressed during the formal press conference when the final regulations were made public on August 7, 1973. Nonetheless, the regulations, as promulgated, will result in a substantial rollback of certain prices legally put in place in prior control periods. This represents a gross inequity and should be remedied promptly. This letter comments on how this rollback occurs and suggests some remedies.

THE ROLLBACK PHENOMENON

At the start of Phase IV, companies are authorized to utilize either base prices or adjusted freeze prices. Both types of prices are determined on the basis of transactions entered into during certain prescribed periods of time. Under the final regulations, a transaction has been defined as meaning an arm's-length sale occurring at the time of shipment in the case of products and at the time of performance in the case of services. Thus, a firm may be prohibited from availing itself of price levels announced and established in contracts entered into or orders taken prior to the start of Phase IV. For many firms in the capital goods industries where long lead times are common, this will mean a *substantial* rollback of prices at the outset of Phase IV—a deliberate continuation, in effect, of the freeze-imposed rollback. Restated, if a firm lawfully instituted price increases sometime during the base quarter, or later on in Phases II or III, the only way such a price increase can be fully protected going into Phase IV is if it is established as a so-called adjusted freeze price. However, since the adjusted freeze price depends on transactions—defined as prices at the time of shipment—occurring in the freeze base period, if a firm has not made shipments at these lawful prices established in the earlier control periods, it may not maintain these price levels as a matter of right at the outset of Phase IV.

With respect to this gross inequity, it should be emphasized that similar and discriminatory rollback punishment was imposed on the capital goods industries in the Phase I freeze.

CONTRA TO THE DESCRIPTION OF PHASE IV REGULATIONS

When the proposed rules were issued for Phase IV, it was announced by government officials that no rollback of prices was intended. Also, when the final Phase IV regulations were issued, during the press conference, the General Counsel of the Cost of Living Council indicated that the term "adjusted freeze price" was to carry forward the notion "that was contained in the draft regulations of, especially, grandfathering in existing prices." However, even that statement is misleading at least to the extent that for many companies in the capital

goods sector of the economy the freeze imposed a rollback of prices because of the same inequitable definition of transactions governing freeze price levels during that control period. We think the inequity of this definition of transaction is self-evident and we will not repeat here the case against the shipment approach. However, for your convenience in studying the matter, we are attaching copies of our earlier statements to the Council and the Price Commission on this issue.

In short, while the public is being told that prices lawfully established prior to the freeze period are protected at the outset of Phase IV this will not, in fact, always be the case. We think these rules represent a gross inequity and suggest the Council promptly provide fairer rules.

WHAT THE ROLLBACK MEANS

By now the Council must be fully aware of most of the arguments why this rollback imposed on capital goods firms is, in effect a gross inequity. Among these reasons are the following:

1. Companies holding the price line until recently are disadvantaged vis-à-vis those that lawfully increased prices as early as possible in Phase II. In short, those that have made the greater contributions to the success of the controls program have been given the poorer starting position for Phase IV.
2. The rollback actually continues the pattern established in each of the prior phases of price control to the effect that, if a firm has maintained or slowed down the upward movement of its prices, such action has worked to the detriment of its best interests in the next phase of controls.
3. The rollback of prices created a number of supply problems as companies refused to do business at rolledback price levels. These supply problems will be multiplied in Phase IV because of the government's action in maintaining rolledback prices as a starting point for Phase IV.
4. The rule is completely inequitable for those firms which, in Phase III, elected to follow the rules provided under the 1.5 percent alternative. These firms have been told, in effect, that they will not be punished in Phase IV for following this alternative available in an earlier control period. However, where such firms must start Phase IV with rolledback prices, and are unable to increase prices because of the rigid profit restraint rule, they are, in fact, severely handicapped and unfairly penalized because of full compliance with earlier rules.
5. The rollback affects only manufacturers and service organizations as it is specifically eliminated for wholesalers and retailers. We have reference, of course, to the regulation which permits wholesalers and retailers to start Phase IV with adjusted freeze prices defined in part as prices specified in a catalog prior to July 18, 1973.

NEED FOR COUNCIL ACTION

We think that the Council, in all fairness, should take prompt action to remedy this gross inequity imposed on firms with substantial lead times for the products they sell. The most equitable solution would be to provide manufacturers and service organizations with the same starting point in Phase IV granted to retailers and wholesalers; namely, they should be allowed to maintain as a starting point prices specified for any given item in price lists, catalogs, or announcements to customers, assuming that the announced effective date of such price increases was prior to July 18, 1973. Further, it would be logical to allow such firms to maintain as appropriate price levels the prices evidenced by orders lawfully taken prior to the institution of the freeze at prices higher than the adjusted freeze prices, i.e., change the transaction definition to binding contracts for the purpose of determining the "adjusted freeze price." While we recognize that protection for individual contracts is provided by a special rule in Phase IV, no protection is granted for the price levels which these individual contracts represent. We think the distinction made between protecting the individual contracts but requiring a rollback of the prices for future contracts will be seriously disruptive in the marketplace. It also raises a number of questions regarding the application of the Robinson-Patman requirements and related antitrust matters of this kind. Finally, we think it is grossly unfair to limit the protection of contracts to those where there will be performance or delivery prior to January 1, 1974. This again discriminates unfairly against firms producing products or services with

long lead times, namely, the capital goods industries. Further, this will create great uncertainty as to the appropriateness of prices set forth in a host of contracts lawfully entered into in prior control periods.

DECONTROL

In our view the fact that Phase IV rules will grossly discriminate against the "long lead time" manufacturer means attention must be given immediately to the decontrol of the capital goods sector of the economy. The decontrol efforts made to date in part only serve to hinder full and voluntary compliance. We refer to the fact that if a sector of the economy is uncontrollable, as apparently is the case of the food industries, or has already been so inflationary that the future price prospects are for a price decrease as in the lumber industry, the government is willing to decontrol such sectors. However, where the sectors of the economy are "controllable," and without any apparent consideration as to a given sector's contribution to the solution of the inflation problem, the government has not only maintained the controls but has toughened the rules to demonstrate to the public that action is being taken to reduce the inflationary spiral. We think it is none too early for the Council to take a close look at the impact of its policies on the economy. We suggest the arbitrary profit restraint rule coupled with the rollback phenomenon imposed as part of Phase IV rules will lead to serious supply problems which inevitably will impact consumers at some point in the economic cycle ahead. In other words, the seriousness of the distortions and dislocations which are being and will be caused by the Phase IV rules should lead to the earliest possible decisions on removing from controls those sectors of the economy where it is plainly evident that there is no inflationary behavior, e.g., where the marketplace serves as an adequate control.

If the Council elects not to decontrol such sectors at this time, we believe it then must take immediate action to remedy the inequities of the current program and to establish promptly the criteria for selective decontrol, however it is to be accomplished. We can suggest a host of regulation changes which would make Phase IV a more reasonable control mechanism for those who have been the most disadvantaged by price controls to date. For example, the loss-low profit rule discriminates against the capital-intensive firm. We can see no reason for providing an escape mechanism limited to firms with rapid inventory turnover. The table in the regulations for capital turnover should be extended beyond the maximum profit margin rate of 3.0 percent.

We also think it is time to review the inequity of the profit restraint rule. The public, of course, is informed that a company now can select the two best years out of five to determine its base period profit margin. The fact is, of course, that at least two of the five years were years subject to controls which means for all practical purposes that the profit margin restraint test imposes the limits established in the early days of Phase II. (For your convenience, we enclose our earlier statement to the Price Commission on the pitfalls of maintaining this rule any longer than minimally necessary.) Thus, if a firm had a poor base period, this inequity continues to be imposed upon the firm at the outset of Phase IV. The Council, at this point in time, must recognize that the base period profit restraint rule is only an expedient to price control, is a disincentive to productivity, and by definition is highly inequitable for many industries. We see no need for continuing this inequity merely to present to the public the image of a tough price control program.

Finally, we think the Council must recognize at the outset of Phase IV that its decision to delegate most of the responsibility for operating the price control program to the IRS puts a staggering burden on those who are currently making good faith efforts to comply with Phase IV rules. In our view, the IRS has not had the experience nor presently has the capability to handle the function which the Council has delegated to it. We know, for example, that erroneous and/or inconsistent answers have already been flowing out of IRS district offices, confusing companies and, we think, damaging the credibility of government in terms of the operation of the controls program. It may be too late to reverse this decision but, at the minimum, this approach makes even more essential Council action to decontrol the economy. No control program has had success over the long run and the decision to operate the program through the IRS can only accelerate the decline and fall of this particular program.

FINAL OBSERVATION

As this statement points out, we think the Council has opted to start Phase IV with very unfair rules. Further, the burden of such unfair regulations will be inequitably distributed throughout the economy, so that capital goods firms, for example, will be forced to shoulder an unfair portion. We also feel that in the long run the inequities of these regulations will work to the detriment of consumers who will be forced to live with the critical supply shortages which will surface in the months ahead. The time for corrective action is now. As our views above suggest, if the regulations are not substantively and substantially amended, we think the only solution left is prompt decontrol.

* * * * *

We want to thank the Council again for an opportunity to express our views. We would, of course, be happy to confer with the staff of the Council on any of the points we have raised, if this would be of assistance. I should add that we are taking the liberty of sending copies of this letter to members of the Cost of Living Council and other cognizant government officials.

Respectfully,

CHARLES STEWART,
President.

Enclosures.

MACHINERY AND ALLIED PRODUCTS INSTITUTE,
Washington, D.C., September 11, 1973.

Re Supplementary Statement Regarding Price Rollback Imposed by Phase IV Controls

Dr. JOHN T. DUNLOP,
Director, Cost of Living Council, 2000 M Street NW., Washington, D.C.

DEAR DR. DUNLOP: We greatly appreciated the opportunity to meet with key members of the Cost of Living Council staff on September 4 to discuss in greater detail the plight of the capital goods industries as a result of Phase IV regulations. At that meeting, members of your staff indicated it would be helpful to have further documentation regarding the "long-term contract" problem for capital goods companies which stems from the fact that the Phase IV regulations impose a price rollback or threaten to impose one in 1974.

In providing the material requested, we think it is important first to underscore certain characteristics of the capital goods industries which are highly pertinent and some of the problems these firms face in Phase IV. In this way we can highlight certain major inequities already imposed by controls on these firms, which, in turn, heighten their concern over the price rollback. We turn first to some important characteristics of the capital goods industries.

SOME CHARACTERISTICS OF CAPITAL GOODS PRODUCERS

We believe that, for a full understanding of the perversity of the regulations in Phase IV in terms of the impact on capital goods producers, there must be an awareness of certain key characteristics of the capital goods industries. Six principal characteristics come into play. They are as follows:

1. The industries have the common denominator of a significant *lead time between order and delivery*—varying from 3 to 6 months to 10 years or more. Many factors contribute to this phenomenon including a long production cycle and large backlogs as the economy moves to a "boom" position in the economic cycle.
2. There is typically an *infrequency of purchase* of a given capital good. This is true because of the long life of certain equipment; the "big ticket" nature of many items, i.e., the large capital investment a purchase represents; the fact that many are built to customer specifications; and the cyclical demands of customers.
3. Almost without exception, capital goods are *purchased to improve productivity* and, thus, tend to be noninflationary. In fact, more often than not—standing alone—the purchase of such products would lead to lower prices for the eventual consumer. For example, a more efficient printing press will lower a portion of the newspaper's cost of production and, if all other costs remained the same, the price of the paper to the consumer.

4. Typically, capital goods industries are *cyclical* in nature. As a result, periods of low profits must be matched with offsetting periods of higher profits if the return on investment to the stockholder owners is going to be sufficient to attract the capital necessary for operations.
5. Typically, the industries compete in *highly competitive markets* where the constraints provide an on-going "price control." This is evidenced by the government's figures for the first half of 1973 which show "guideline" (or below) price increases for these industries.
6. The firms in these industries employ large amounts of capital which puts *a premium on a "reasonable" return* on investment and makes *ease of entry relatively difficult*. In short, government induced shortages in the products of these industries will not lend themselves to a ready solution absent decontrol.

In sum, for capital goods industries, there is not a simplistic relationship between cost and price. This is particularly true for fixed-price contracting for long lead-time items which is common in many of these industries and which, by definition, requires cost anticipation. In short, the policy of reducing inflation by dampening inflationary expectations cannot be accommodated by such industries which must anticipate costs to survive. Second, the policy to require cost absorption which is at the heart of the current approach to controls, is not suitable for these industries because of the stretch-out between order and delivery and the infrequency of purchase of the goods they produce.

We turn now to the background concerns which the capital goods firms have in confronting the price rollback phenomenon imposed by Phase IV regulations.

CONTROL INEQUITIES IN GENERAL

Phase IV rules provide capital goods firms—and all firms for that matter—with a number of burdens, many of these representing continuations or extensions of earlier problems under controls. In capsule form, these concerns, other than the price rollback, include the following:

1. The automatic application of a profit restraint rule as a result of doing "custom product" business.
2. The imposition of profit restraints and, more particularly, the selection of "base years" representing for many firms and industries a period of a recession or depression.
3. The arbitrary cut-off under the loss-low profit rule which discriminates capital-incentive firm.
4. The exemption from controls of certain basic material such as copper scrap without an automatic flowthrough of the increased costs to users of the scrap.
5. The absence of a reasonable exception procedure to provide meaningful relief.
6. The back-door continuation of the freeze through prenotification, delays brought about through the delegation of authority to the IRS, and a change in the prenotification rules, i.e., CLC-22, after Phase IV had begun.
7. The new approach to relief requiring hearings when a firm or industry otherwise qualifies for price relief under Phase IV rules.
8. The punitive nature of the two freeze periods where price rollbacks were imposed on capital goods firms under rules defining transactions as occurring at the time of shipment.

In short, many capital goods companies start Phase IV severely handicapped by the nature of the past and present controls.

With this as background to the mounting concern of such firms as to the dislocations and long-range marketing and supply misallocations likely to follow if controls last much longer, we turn now to a major gross inequity—still another price rollback—of Phase IV using case study material to illustrate the critical problem area.

THE PHASE IV PRICE ROLLEBACK—A CASE STUDY

The regulatory approach.—For companies with any kind of lead time between order and shipment, the Phase IV rules impose either a rollback of prices or the threat of one. In addition, due to the characteristics of long lead-time and "infrequency of purchase," the rules will even roll back price levels *lawfully established* in the earlier control periods. Such disruption to capital goods firms is,

in our view, tantamount to discrimination. We have explained in some detail in our letter of August 23 how this rollback phenomenon occurs under the Phase IV rules. (For your convenience, another copy of this letter is attached.)* The central point being, of course, that by defining "transactions" as "shipments" in determining both base prices and adjusted freeze prices, the regulations discriminate against firms where there is a time lag between order and shipment.

In this statement, we wish to present a typical example of how this rollback phenomenon occurs and the plight it presents to a capital goods producer. In our discussion on September 4, we were asked to describe the impacts on different types of contracts and will attempt to do so in explaining our typical case which follows.

The case study.—For our case study, we have selected a product which is typical of capital goods in the following respects:

The lead time from order or contract to shipment ranges from 8 to 14 months in this particular case.

While there are relatively few producers of this item, the domestic marketplace is highly competitive and, further, the overseas producers of this product provide continuing competitive pressures.

Marketing practice calls for firm fixed-price contracts.

Typically, for the larger models in this product line, the number of transactions in a year for any one firm in the industry would range from 12 to 18.

Chart 1 (of three charts attached) shows the relationship of contract price, shipment price, and costs from 1968 through a projection for 1974.

To us, this graph, which is not a hypothetical situation, but is, in fact, based on actual data, shows the following:

1. Freeze II shipments had to be made at rolledback prices.
2. Phase IV shipments after January 1, 1974 are not protected pursuant to Section 150.76 and will lead to price rollbacks because cost justification will not be available due to the arbitrary cutoff on cost reach-back.
3. There is "zero" profit margin protection under Phase IV rules, in fact there is a requirement to maintain close to a loss transaction.
4. The lawful Phase III price was non-inflationary. In fact, it was lower than the prices charged four years earlier.
5. The Phase IV authorized price is below the price protected in part by statute, namely, the prices charged on May 25, 1970.
6. The company is now forced to decide whether it should stay in this line of business and this decision can be put off only until the next major bid opportunity arises.

During our conference with Council staff, it was suggested that it would be useful to know more about some of the variables which might lead to different results with regard to typical business practices of capital goods firms. One obvious variable is the matter of fixed-price contracts versus contracts including an automatic escalation provision. In general, where escalation clauses are used, the contracts are extremely long-term in nature extending well over a year in most cases and in some running up to 10 years or more in duration. Obviously, under this kind of contract, infrequency of purchase would lead to wide variations in terms of results in comparing contract prices, shipment prices, and costs. Further, one can only expect that there would be wide variance between contract price, shipment price, and costs.

As to shorter-term contracts, i.e., contracts of less than one year's duration, the inequity of the Phase IV rules is more immediate than it is with the longer term contracts. In the longer term contracts, the rules provide uncertainty due to the element of a risk of a price rollback at the time of shipment. For shorter-term contracts, there may be, in fact, a price rollback imposed by these rules. We call your specific attention to Chart 2 which shows how this rollback will, and, in fact, has taken place.

To us, Chart 2 clearly shows the following:

1. Because of the definition of "transactions" proposed by the freeze rules, the freeze accomplished a price rollback. This is particularly the case where only recently has the market permitted the company to use the authorized price increases granted to it in Phase II.
2. The rule which protects contracts entered into prior to the freeze does not protect *price levels*.
3. Phase IV will lead to additional price rollbacks because of the arbitrary cost reach-back rule coupled with the perverse definition of transactions.

*Copies of this statement were distributed in Bulletin 5000.

4. Protecting individual contracts falls short of the kind of protection that capital goods companies need to prevent price rollbacks. The price levels evidenced by individual contracts should be protected as well.

Perhaps the easiest way to show the adverse impact on the typical capital goods company is to contrast it with that for commodity or short lead time products. In Chart 3 we have set out in graphic form the impact on certain commodity or short lead time products. This chart is based on BLS data and represents those commodities which are utilized in the manufacture of the product which is the subject of Chart 1.

We think this chart clearly shows that the sellers of short lead time products have a significant advantage over firms in the capital goods industries. As this graph indicates, when these firms were hit with frozen prices, they were able to maintain price levels previously established and, therefore, could protect their profit margins. This will, of course, also be their situation under Phase IV rules, although as costs continue to mount over time, presumably the margins will be eroded. We think it is obvious that there is an inequity in the treatment of capital goods firms and that the rules are discriminatory, *per se*.

RECOMMENDATIONS

We have suggested in our earlier statement a series of actions which could be taken to help remedy the inequity provided by Phase IV rules. We think, however, that whatever action is taken, the following factors must be recognized by the Council:

1. To force capital goods producers to "swallow" costs in the same manner as producers of goods with short or no lead times will clearly penalize firms with long lead time products to the point of creating a gross inequity.
2. To provide the appropriate remedy might, at first blush, appear to be backing away from the broad policies adopted by the Council. This would not be the case, however, because the capital goods industries have not and are not contributing to the inflationary problems.
3. Since increases in productivity are an essential element in any long-range solution to inflation, the Council must recognize that forcing capital goods firms to make business decisions which could create shortages of plant and equipment necessary to achieve productivity gains is counter-productive.

As we have suggested in our earlier statement, the time for action is now. The burden of the unfair regulations provided in Phase IV is being inequitably distributed throughout the economy. Unless prompt action is taken to correct these inequities, the control program inevitably will harm consumers.

* * * * *

We want to thank the Council again for the opportunity to express our views and, of course, will be happy to work with the Council in developing corrective action.

Respectfully,

CHARLES STEWART,
President.

Attachments.

CHART 1

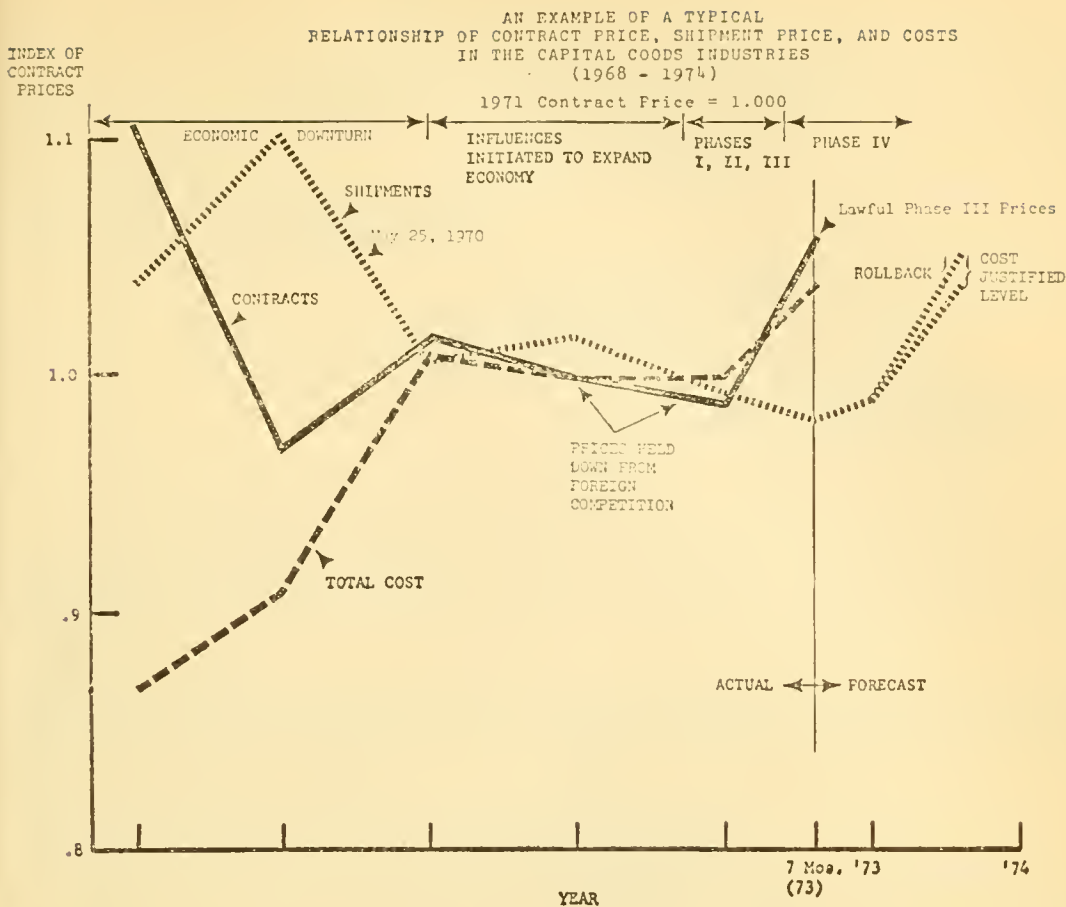
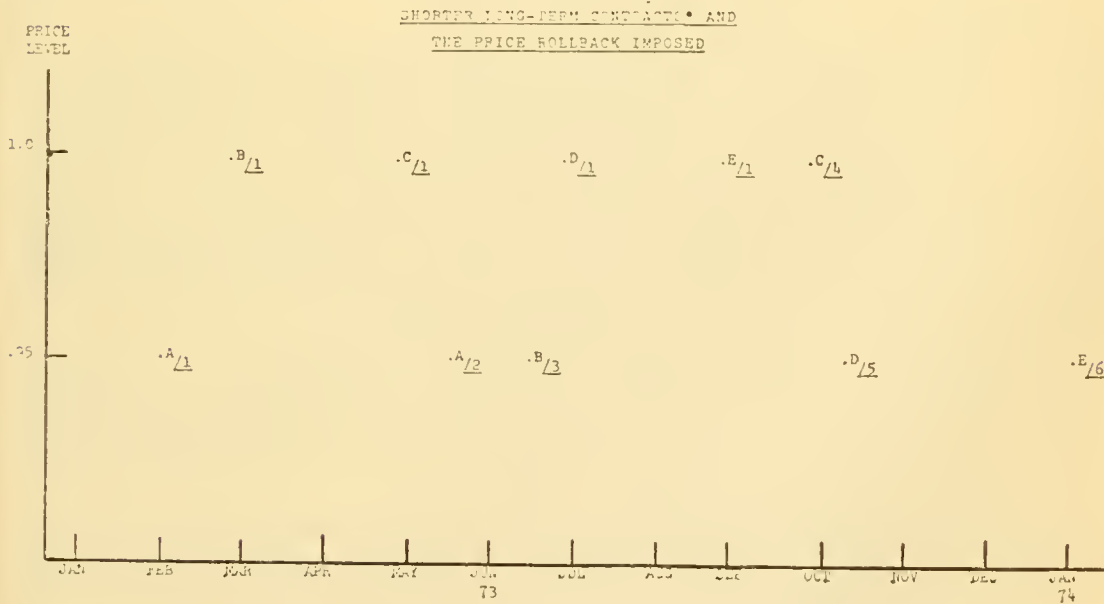


CHART 2



* Lead time on contracts from time of contract to shipment: 3-5 months.

1/ Date individual contract was placed with firm fixed price in contract.

2/ Price at which product in contract A was shipped. This price established the Freeze II price.

3/ Price rollback under the freeze rules.

4/ Prices protected in contract C by Phase IV rules.

5/ Price not protected by Phase IV rules because the contract was entered into during the freeze.

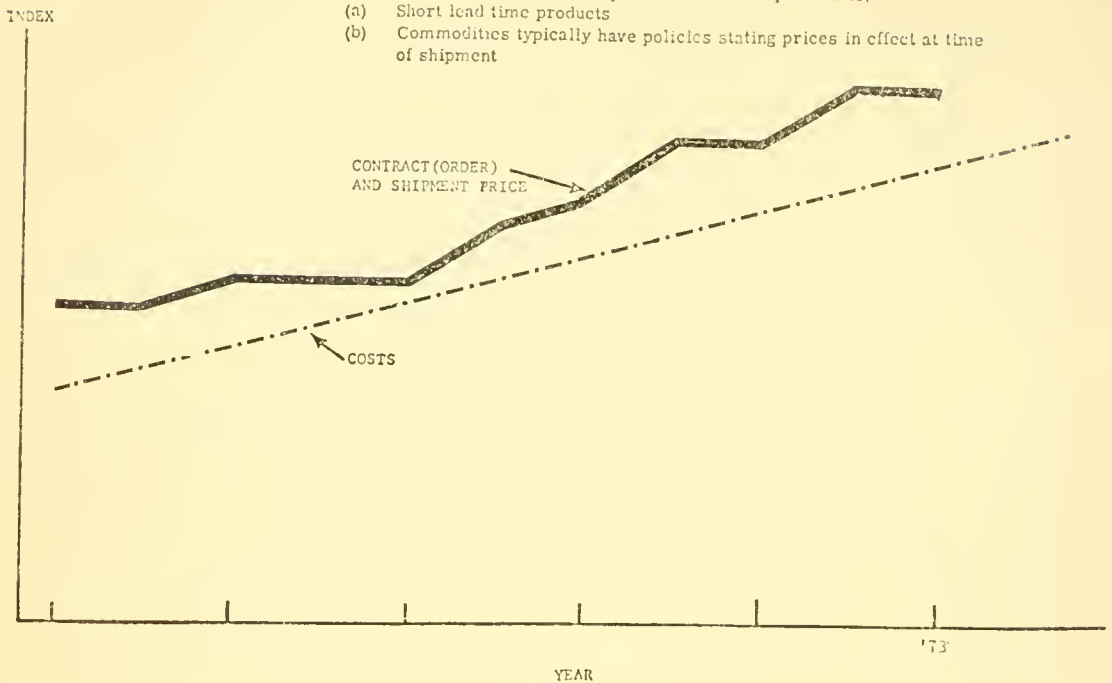
6/ Unless the rules change, the price in contract E will also have to be rolled back.

CHART 3

TYPICAL COMMODITY OR SHORT LEAD TIME PRODUCT

Comparison Contract Price, Shipment Price, and Costs

..NOTE: Contract (order) Price and Shipment Price are equal due to:
 (a) Short lead time products
 (b) Commodities typically have policies stating prices in effect at time of shipment



STATEMENT OF ATTORNEYS FOR FEDERATED DEPARTMENT STORES, INC.

ARNOLD & PORTER,
 Washington, D.C., October 11, 1973.

Hon. CHARLES McC. MATHIAS, Jr.
 U.S. Senate,
 Russell Senate, Office Building, Washington, D.C.

DEAR SENATOR MATHIAS: Those of us who must contend with the Phase IV controls are deeply grateful to you and the other members of the Separation of Powers Subcommittee. Your investigation of the powers and procedures of the Cost of Living Council could not be more timely.

The Subcommittee may wish to take a close look at a provision in the Phase IV Regulations which would do honor to the White Queen. This is Section 150.304 of Subpart K, a provision which makes it impossible for a retailer to know whether he is in compliance with the Phase IV controls until *after* a compliance period is over. (" 'That's the effect of living backwards,' the Queen said kindly: 'it always makes one a little giddy at first—' ")

During Phase II, retailers were permitted to comply with price controls on an item-by-item basis; that is, they could assure compliance by confirming that their customary initial percentage markup (CIPM) for each item did not exceed the allowable CIPM for that item. Item-by-item compliance worked during Phase II. It held prices down. And it allowed retailers to assure prospective compliance with the program.

The Phase IV Regulations have changed all this. Section 150.304 now compels retailers to comply on a category-by-category basis. This change reflects considerable bureaucratic indifference to the manner in which the retailing business must be conducted.

Retailers can control the prices of individual items. However, retailers cannot control CIPMs for *categories* of items. They confront frequent, unpredictable and uncontrollable shifts, in product mix. Consumers trade up and trade down, and increase and decrease their purchases of particular items, for all sorts of unpredictable and uncontrollable reasons, *e.g.*, the weather. Since retailers are powerless to control shifts in product mix, they are powerless to control or even predict shifts in CIPMs for categories of items. Yet this is what

Section 150.304 requires of them. In the words of Lewis Carroll, retailers are now required to play croquet, for extraordinarily high stakes, with croquet balls of live hedgehogs and mallets of live flamingoes.

Our client, Federated Department Stores, Inc., wants to comply with Phase IV and wants to be able to assure its compliance before the fact. It does not wish to be vulnerable to violations which can only be discovered after the fact. Accordingly, Federated has filed the enclosed application for an exception with the COLC, to permit compliance on an item-by-item basis. The application is now pending.

If the Subcommittee or its staff wishes any additional information on this matter, we will be pleased to provide it.

Sincerely,

RICHARD J. WERTHEIMER.

STATEMENT OF THE JOHNS HOPKINS HOSPITAL

THE JOHNS HOPKINS HOSPITAL,
Baltimore, Md.

COMMENTS ON RELATIONS WITH THE COST OF LIVING COUNCIL

On August 28, 1973, The Johns Hopkins Hospital filed suit in Federal Court against the Cost of Living Council, seeking relief from what the Hospital believes to be arbitrary and unreasonable denials of requests to raise prices for patient services.

The principal issue in the litigation is the so-called "profit margin limit". Under rules adopted by the Cost of Living Council for health care institutions, this Hospital cannot exceed its profit margin (calculated as an average of the best two of the last three years) without exceptions granted by the COLC. Unfortunately, this Hospital has operated at a loss for many years, and our base period profit margin limit is a *deficit* of \$1,067,000. We can do nothing to improve this result without the COLC's permission.

On June 29, 1972, we filed a request with the COLC for a price increase, asking permission to raise our revenues to the point that operations would yield a *break-even* result. We explained that it was critical that some of our oldest buildings be replaced and that the only source of substantial funds would be the bond market. Obviously it would be very difficult to sell bonds, and even more difficult to retire them, when the Hospital was operating at an annual deficit in excess of \$1,000,000.

On September 27, 1972, the COLC issued an order denying all our requests, but failed to address the profit margin issue. In response to a further request by the Hospital, the COLC issued an amended decision on November 14, 1972, denying our request for an exception on the profit margin.

On December 18, 1972, the Hospital filed a request for reconsideration of the original decision. In the interim since June 29, 1972, many new rules and regulations had been added, and a new reporting form had been developed. We also asked consideration of an "intensity" factor because of the growing number of services rendered to the same numbers of patients. After many conferences with the COLC staff, the Hospital submitted a revised request for reconsideration on April 20, 1973. More delays and talks continued until the Hospital filed a final revised request on June 8, 1973. Of course, while all this was going on, we lost forever the opportunity to increase prices during the fiscal year that would end on June 30, 1973.

On July 23, 1973, the COLC issued its decision and order denying our request for reconsideration, and informed the Hospital that all administrative remedies had been exhausted. This left us little choice but to proceed with litigation.

All other industries that suffered losses during the base period were permitted to increase revenues so that at least a break-even result could be attained, and in fact, earn a small profit. We believe this to be an intolerable situation when a private concern such as this Hospital is required to operate at a loss.

In determining the extent of "hardship" on hospitals, the COLC prepares a "cash flow statement" in which are tabulated all sources of cash and all uses of cash. In preparing this statement, hospitals are required to show investment income from *all* endowments, even those which are restricted by donors. In other words, all endowment income is used before prices can be raised to cur-

rent patients, something which we believe would never have been intended by donors. Certainly no donor gives money to be used to subsidize Blue Cross, Medicare and Medicaid patients!

Also, on the cash flow statement, the hospital gets credit for only 10% of its current capital expenditures, apparently on the assumption that this represents the benefit to current patients. This is incredible." We may have to pay \$100,000 to replace an X-ray machine, but we can only use \$10,000 on the statement to show financial hardship.

Now that we are in Phase IV, we are still limited by all kinds of rules. Wages cannot increase by more than 5.5%, regardless of the fact that we recently negotiated a new labor contract with nearly an 8% increase. Non-wage items cannot increase by more than 2.7% of total expenses, regardless of the fact that our suppliers are now free to raise prices to reflect increased costs. When we say that expenses cannot exceed certain percentages, we mean that the COLC will not grant *revenue* increases beyond these limits, regardless of what we actually spend.

So, as wages and prices for food, drugs, utilities, insurance and supplies rise rapidly, we cannot increase our net revenues by more than 6% per annum, without exceptions granted by the COLC. Such exceptions have eluded us, and appear to be few in number for other hospitals.

The situation has grown intolerable, and the COLC seems bent on holding down prices, no matter what the damage to the hospital industry.

W. THOMAS BARNES,
Vice President and Treasurer.

THE JOHNS HOPKINS HOSPITAL, 601 NORTH BROADWAY, BALTIMORE,
MARYLAND 21205, ATTENTION: W. THOMAS BARNES, PLAINTIFF

v.

COST OF LIVING COUNCIL; GEORGE P. SHULTZ, AS CHAIRMAN OF THE
COST OF LIVING COUNCIL; AND JOHN T. DUNLOP, AS DIRECTOR OF
THE COST OF LIVING COUNCIL, 2000 M STREET, N.W., WASHINGTON,
D.C. 20508, DEFENDANTS

IN THE UNITED STATES COURT FOR THE DISTRICT OF MARYLAND

Civil Action No.

Complaint

THE JOHNS HOPKINS HOSPITAL, Plaintiff, by its attorneys, Francis D. Murnaghan, Jr. and Neal D. Borden, sues the COST OF LIVING COUNCIL, GEORGE P. SHULTZ, as Chairman of the Cost of Living Council, and JOHN T. DUNLOP, as Director of the Cost of Living Council, Defendants, as follows:

1. The Plaintiff is a non-stock, non-profit corporation organized and existing under the laws of the State of Maryland, located and having its principal place of business in Baltimore, Maryland, and is duly licensed by the State of Maryland as a general hospital.

2. The Defendant Cost of Living Council, hereinafter referred to as the "Council", is an agency of the United States Government created by Executive Order 11615 and continued in existence by superseding Executive Orders, including Executive Orders 11627, 11640, 11695 and 11723. The Defendant George P. Shultz is Secretary of the Treasury and Chairman of the Council, pursuant to the provisions of Section 1(b) of Executive Order 11695 and Section 6 of Executive Order 11723. The Defendant John T. Dunlop is the Director and a member of the Council.

3. This Court has jurisdiction of these proceedings pursuant to Sections 210 and 211 of the Economic Stabilization Act of 1970, as amended (P.L. 91-379 (1970), P.L. 92-210 (1971), P.L. 93-28 (1973)), hereinafter referred to as the "Act".

4. Executive Order 11615, issued on August 15, 1971, established the Economic Stabilization Program, instituting a freeze on prices, rents, wages and salaries, including prices charged by the Plaintiff, for a period of ninety (90) days. The Council was designated as the agency of the United States responsible for administration of the Economic Stabilization Program.

5. Executive Order 11627, issued on October 15, 1971, continued the existence of the Council and established in addition a Price Commission, hereinafter referred to as the "Commission". As authorized by such Order, the Council was to establish stabilization goals and the Commission was to prescribe specific standards, criteria and regulations, make rulings and decisions, and issue forms relating to the control of prices and rents, including prices charged by the Plaintiff and the amount of net annual revenues received by the Plaintiff.

6. On December 29, 1971, the Commission issued a regulation governing the prices and net revenues of all institutional providers of health services, including the Plaintiff, 6 C.F.R. § 300.18. Violation of this regulation could result in the imposition of fines, roll-backs, refunds and injunctions under the Act.

7. Executive Order 11695, issued on January 11, 1973, abolished the Commission and transferred all of its functions to the Council. At the same time the Council issued new regulations, 6 C.F.R. §§ 130.60 and 130.61, applicable to institutional providers of health services, including the Plaintiff, and providing that such entities were subject to continuing mandatory economic controls as set forth in the Commission Regulation referred to hereinabove. Under the new regulations, the Council also assumed and succeeded to all applicable rights, duties and obligations of the Commission. Executive Order 11695 reaffirmed all prior orders, regulations and directives issued by the Council and Commission pursuant to prior Executive Orders and granted to the Chairman of the Council the right to alter, amend and revoke such prior orders, regulations and directives.

8. During the Plaintiff's base period (its fiscal years ended June 30, 1969, June 30, 1970 and June 30, 1971), its net revenue margin reflected loss operations each year. On June 29, 1972, pursuant to the Commission's regulations, 6 C.F.R. §§ 300.18(c) (2) 305.30 and 305.31, the Plaintiff filed a Request for an Exception to allow it to exceed its base period net revenue margin for the fiscal year ending June 30, 1973, and for an Exception to allow it to increase its aggregate annual revenue for the same fiscal year through price increases in excess of those otherwise permitted under the aforesaid § 300.19(c) (2). A copy of the Request is attached hereto and marked as Exhibit A. Specifically, the Plaintiff asked that it be permitted to conduct its operations at a break-even level, i.e., without a loss, for the fiscal year ending June 30, 1973. Because of the Plaintiff's base period loss operations, the Plaintiff was required, under the relevant regulations of the Commission and in the absence of an Exception, to continue its operations in such a manner as to maintain an equivalent or greater net revenue loss for the 1973 fiscal year. The requested Exception relating to an increase in aggregate annual revenue was necessary in order to permit the Plaintiff to bring its operations to the break-even level. The Plaintiff filed the Request for these Exceptions on the basis of the serious hardship imposed upon it by the forced continuance of loss operations, requiring substantial subsidies from endowment resources, and because of the gross inequity imposed on the Plaintiff by being placed in this unfavorable position, as compared to other institutional providers of health services. In order to maintain a competitive posture with newer suburban hospitals and thus retain its patient population, the Plaintiff embarked on a major physical plant renovation and replacement program, the Phased Redevelopment Program, during the fiscal year ended June 30, 1973. The successful funding of this program requires the Plaintiff to operate at least at a break-even level.

9. On September 27, 1972, the Commission issued a Decision and Order denying the Request for an Exception to allow an increase of aggregate annual revenue. Copies of the Decision and Order, and of the letter accompanying it, are attached hereto and marked as Exhibit B. On November 14, 1972, a document entitled Amended Decision and Order was promulgated by the Commission which reiterated the previous denial and specifically added a denial of the Request for Exception to allow the Plaintiff to exceed the base period net revenue margin. Copies of the Amended Decision and Order, and of the letter accompanying it, are attached hereto and marked as Exhibit C.

10. On December 18, 1972, the Plaintiff filed with the Commission a Request for Reconsideration pursuant to the Commission's regulations, 6 C.F.R. §§ 305.32 through 305.38. A copy of the Request for Reconsideration is attached hereto and marked as Exhibit D. On April 20, 1973, following several meetings with representatives of the Commission and Council, the Plaintiff filed a revised Request for Reconsideration with the Council, as successor to the Commission. A copy of the revised Request for Reconsideration is attached hereto and marked as Exhibit E. On June 8, 1973, after additional conferences with representatives

of the Council, the Plaintiff filed a final revised Request for Reconsideration with the Council, which is attached hereto and marked as Exhibit F.

11. On July 23, 1973, the Council issued its Decision and Order denying the Plaintiff's Request for Reconsideration. Copies of the Decision and Order, and of the letter accompanying it, are attached hereto and marked as Exhibit G. The inordinate delay of the Defendants in concluding their consideration of the Plaintiff's Requests for Exception and Reconsideration, which the Plaintiff was required to submit in order to exhaust administrative remedies, had the effect of denying to the Plaintiff any opportunity to institute this complaint within the fiscal year to which the Plaintiff's original Requests for Exception related. Thus, even if this Court were to determine that the Plaintiff was in fact entitled to increase its prices in accordance with its Request for Exception, the Plaintiff would obviously be unable to effect such price increases during the fiscal year in question. Moreover, for subsequent fiscal years, the Plaintiff will be prevented from reaching a break-even point in its financial operations, and will be forced to continue to operate at a loss and, therefore, to deplete its resources.

12. The denial of the Plaintiff's Requests for Exception and Reconsideration relating to its base period net revenue margin imposes a serious hardship and gross inequity on the Plaintiff. The actions of the Defendants effectively require the Plaintiff to use its endowment resources to subsidize a continuing loss operation, eliminating the availability of the endowment for capital improvements, expansion or such other valid purposes for the endowment as may be determined by the Trustees thereof. The denial violates §§ 203(b) (1), 203(b) (2) and 203(b) (5) of the Act, which require, respectively, that the standards issued under the Act be generally fair and equitable, provide for the making of such general exceptions and variations as are necessary to prevent gross inequities and hardships, and call for generally comparable sacrifices by business, labor and other segments of the economy. During the same fiscal periods in which the Plaintiff has been and will be required to bear the burden of continued losses, many businesses have reported record operating profits.

13. The denial of the Plaintiff's Requests for Exception and Reconsideration relating to its base period net revenue margin violates the Fifth Amendment to the Constitution of the United States, in that it effectively takes private property of the Plaintiff for a public use without just compensation. The actions of the Defendants give the Plaintiff no alternative but to continue to use, even to the point of exhaustion, its endowment resources virtually entirely for the contained subsidization of an operating loss, assertly for the benefit of the public which the Plaintiff serves, and without regard to other benefits which that public receives or may receive from the activities of the Plaintiff. The Plaintiff must pursue this course of action without any form of compensation from the Defendants or any other governmental entity, for the substantial adverse consequences to its operations as a whole, the threat to its continued viability, and the consequent impairment of its general non-profit and charitable services to the general public.

14. The Commission's regulation applicable to nonprofit institutional providers of health services, including the Plaintiff, states in part that such an organization may not increase its prices above a certain level, if the increased price so charged results in an increase in its net revenues as a percentage of total operating revenues over the level of such revenues which prevailed during a certain base period, 6 C.F.R. § 300.18(b) (1). There is no provision in this regulation for relief of non-profit institutional providers which have an operating loss during the aforementioned base period. Under other regulations promulgated by the Commission with respect to manufacturers, wholesalers, retailers, and certain service organizations, 6 C.F.R. §§ 300.31 and 300.32, organizations which have a history of operating losses or low profits may raise their prices without limitation to produce a minimum operating profit. Section 300.32(f) of these regulations specifically excludes institutional providers of health services from such relief. The failure of the Commission to provide this relief to institutional providers of health services violates §§ 203(b) (1) and 203(b) (5) of the Act, which require that the standards under the Act be generally fair and equitable, and call for generally comparable sacrifices by business, labor and other segments of the economy. The failure of the Commission to provide this relief to the Plaintiff and other institutional providers of health services, while making it available to other persons, is also a violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to institutional providers of health services, including the Plaintiff, due process and the equal protection of the laws.

15. The denial of the Plaintiff's Requests for Exception and Reconsideration violates § 201(b)(1), 201(b)(3) and 201(b)(5) of the Act, in that the Commission and Council have failed to consider substantial improvements in the operations of the Plaintiff resulting from internal administrative and management efforts to reduce operating expenses and to minimize operating losses. Such improvements have taken place in the operations of the Plaintiff. Specifically, § 201(b)(3) of the Act requires the standards issued thereunder to take into account changes in productivity and such other factors consistent with the purposes of the Act as are appropriate. The Decisions and Orders here involved have failed to take into account the improvement in net revenue margin attained by the Plaintiff as a result of the aforementioned internal administrative and management efforts.

16. The denial of the Plaintiff's Requests for Exception and Reconsideration by the Council, in its Decision and Order issued on July 23, 1973, as it relates to the Plaintiff's proposed increase in aggregate annual revenues through price increases, is based on an error of fact. The cash flow hardship suffered by the Plaintiff is not due to preliminary expenses and fees related to a planned construction program, as determined by the Council. Such fees and expenses have not been substantial, and to the extent they have been incurred, they have been paid from funds budgeted for capital expenditures, not from funds budgeted for operating expenses. Rather, this cash flow hardship is due to the Plaintiff's inability to increase its prices, because of the actions of the Council and Commission.

17. The denial of the Plaintiff's Requests for Exception and Reconsideration, with respect to the Plaintiff's proposed increase in aggregate annual revenues through price increases, violates §§ 203(b)(1) and 203(b)(5) of the Act, which require that the standards under the Act be generally fair and equitable, and call for generally comparable sacrifices by business, labor and other segments of the economy. The prices of goods and services supplied to the Plaintiff have been subject to far less restrictive controls under the Economic Stabilization Program than the prices charged by the Plaintiff. During the Plaintiff's fiscal year ended June 30, 1973, the Plaintiff was not permitted, under the relevant regulations of the Commission on Council, to raise its prices without an Exception in an amount which had the effect of increasing its aggregate annual revenues by more than 6%. This limit was imposed regardless of the cost increases suffered by the Plaintiff for goods and services, many of the suppliers of which were exempt from mandatory controls throughout the fiscal year in question, and particularly since January 12, 1973. The costs of many supplies purchased by the Plaintiff during the fiscal year ended June 30, 1973 increased more than 6%.

18. The Council, in denying the Plaintiff's Request for Reconsideration, refused to permit the Plaintiff to utilize a length-of-stay adjustment in computing the actual budget data required to evaluate the results of the Plaintiff's operations for the fiscal year ended June 30, 1973. Inclusion of this adjustment by the Plaintiff in the compilation of its actual budget data for that fiscal year and all subsequent periods is necessary in order to reflect accurately and correctly the results of the Plaintiff's operations and to provide accurate projections of future operations. The use of a similar adjustment by institutional providers of health services is now authorized by the Council for fiscal years beginning on or after July 1, 1973. The Council refused to accept the use of the Plaintiff's adjustment because it had not been "authorized", as stated in a letter from the Council dated June 12, 1973, attached hereto and marked as Exhibit H. This refusal violates § 203(b)(3) of the Act, which requires standards issued pursuant to the Act to take into account changes in productivity and such other factors consistent with the purposes of the Act as are appropriate. The Plaintiff's length-of-stay adjustment reflects directly changes in productivity and similarly appropriate factors existing in the Plaintiff's operations.

WHEREFORE the Plaintiff prays that this Court:

1. Issue a declaratory judgment that the denial of the Plaintiff's Request for Exception and Request for Reconsideration is arbitrary, capricious and an abuse of the authority and discretion granted to the Defendants and that the Plaintiff must be granted the relief requested therein.

2. Issue a declaratory judgment that § 300.32(f) of the Commission's regulations, which excludes institutional providers of health services, including the Plaintiff, from the operation of § 300.32 of those regulations, and §§ 130.60 and 130.61 of the Council's regulations which continue the effectiveness of the Commission's regulations, are unconstitutional, unlawful, arbitrary, capricious and an

abuse of the authority granted to the Defendants, in that they deny to institutional providers of health services, including the Plaintiff, the relief made available to other institutions with a history of operating losses, and that such regulations to this extent must be struck down.

3. Issue a declaratory judgment that the Plaintiff may and must use its length-of-stay adjustment in computing actual budget data to determine the results of past operations and to project the results of future operations for purposes of the Economic Stabilization Program.

4. Award to the Plaintiff the sum of One Million One Hundred Thousand Dollars (\$1,100,000,000), being the amount of the net operating loss suffered by the Plaintiff during its fiscal year ended June 30, 1973.

5. Grant such other and further relief as it shall determine to be fitting and proper.

FRANCIS D. MURNAGHAN, Jr.,
NEAL D. BORDEN,
Attorneys for Plaintiff.

STATEMENT OF AMERICAN HOSPITAL ASSOCIATION

AMERICAN HOSPITAL ASSOCIATION,
October 24, 1973.

HON. CHARLES MCC. MATHIAS, Jr.,
*Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate,
Washington, D.C.*

DEAR SENATOR MATHIAS. The American Hospital Association would like to commend you for holding hearings on the very crucial subject of the Economic Stabilization Program and its impact on various segments of the economy.

The Economic Stabilization Program has worked tremendous hardship on the hospital field. The regulations are complex, they have been far more restrictive than those applied to the rest of the economy, and they have been subject to frequent change and retroactive application. The grave problems hospitals and other health care institutions faced in Phase 2 were compounded in Phase 3, when they were kept under mandatory controls while having to purchase goods and services necessary to patient care that were removed from controls and rapidly escalated in price. Moreover, preliminary indications as to the substance of Phase 4 regulations, which are about to be promulgated for the health care industry, will present additional serious problems which cannot be controlled by hospitals and will impair their ability to deliver quality health care to patients.

When the Economic Stabilization Program was initiated, the American Hospital Association pledged its full cooperation to help achieve a reduction in the rate of inflation. As a matter of fact, the Association has worked closely with the economic stabilization agencies and we have endeavored to keep our members fully informed in order that they could meet the objectives of the program.

The results of our efforts to stabilize hospital prices have been substantial. It gives us considerable satisfaction that hospital price increases have taken the steepest decline in their history. Of equal significance is the fact that hospital prices have increased far less than prices in the economy as a whole. This has been accomplished at a cost of great frustration, and serious financial problems have developed in hospitals which must be faced.

These problems result from such crucial issues as: Cost of Living Council regulations frequently being applied retroactively; "stabilization" regulations prohibiting health care institutional providers from raising prices to offset otherwise allowable cost increases in goods and services which they must purchase; criteria allowing exceptions only in cases of negative cash flow; inconsistency between wage regulations and price regulations resulting in costly confusion and inequity; and regulations preventing institutions from recovering allowable costs without securing individual exceptions through a confusing and time consuming process, to mention just a few.

Attached is a summary of some existing problems faced by the health care industry under the Economic Stabilization Program, including recommendations of our Association aimed at rectifying these situations.

In addition, I would like to reiterate our request to present detailed testimony on Economic Stabilization Program problems and issues when your subcommittee holds further hearings on this matter.

Sincerely,

JOHN ALEXANDER McMAHON,
President.

Enclosure.

SUMMARY OF EXISTING PROBLEMS UNDER PHASES II AND III

(American Hospital Association, September, 1973)

I. PROFIT MARGIN LIMITATION

The profit margin limitation prohibits a hospital from increasing its base period profit or decreasing its base period loss. As a result, if a hospital's average loss for a prior two year period had been \$200,000, and in the current year it reduced its loss to \$100,000 on approximately the same amount of business, the hospital would be in violation under the program. This limitation provision causes further inequity in that it requires that the percentage of loss be maintained. A hospital therefore which is increasing its volume of activity must lose a larger amount of dollars to maintain the same loss ratio, or else be in violation.

This inequitable rule is being challenged in the courts by several California hospitals and the California Hospital Association.

Recommendation :

That current regulations should be amended to permit a hospital to reduce its loss to at least a break even point without being in violation, and there should be a waiver of violation in closed fiscal years against institutions whose only violation was to reduce its percentage of loss.

II. UNREALIZED REVENUE VIOLATION

The staff of the Economic Stabilization Program and in many cases offices of the Internal Revenue Service have maintained that a hospital must have an amount of allowable costs to support a price increase in excess of the amount of revenue the hospital will *realize* from the price increase. This position has never been contained in any issued regulations of the Phase II and III programs.

Under this concept a hospital that has experienced a 6 per cent increase in allowable costs, but has failed to implement a price increase on the *first* day of its fiscal year, cannot recover the full amount of its allowable costs through its revenues. It is forced to absorb as a loss that portion of its allowable costs which were incurred during the period when it had not raised its prices. Thus a hospital which did not raise its prices until the midpoint of its fiscal year is only permitted to recover 50 per cent of its otherwise allowable costs. Conversely a hospital that raised its price at mid year to cover the full amount of its allowable costs would be in violation under this concept. This concept is being challenged by a law suit instituted by several Connecticut hospitals and the Connecticut Hospital Association.

Recommendation :

That instructions be issued which clearly provide that only realized revenues (revenues received) had to or will have to be cost justified.

III. EXCEPTION CRITERIA

The program regulations provide that exception may only be granted in the case of "serious hardship" or "gross inequity". Definitions of these two terms have never been published and the criteria for granting exceptions has been a "negative cash flow" concept as developed by the staff of the Office of Exceptions Review. To date, the components of negative cash flow determination have never been officially published and as a result hospitals have no basis for evaluating their potentials or qualifications for an exception. The large extent to which denials of exceptions have been made probably indicates the limited definition employed by the staff in rendering its decisions. The current policy of granting exceptions solely on the basis of negative cash flow has very serious economic implications for the health care industry. This criteria, if maintained for a period of time, will ultimately require confiscation of the assets entrusted to a health provider by the community. This entire problem is another one of the items being challenged in the California suit.

Recommendation :

That, first, the components of the "negative cash flow" concept be published. Also that definitions be developed for the terms "serious hardship" and "gross inequity", and equitable and realistic criteria be developed to evaluate justifiable hardships and inequities.

IV. WAGE REGULATIONS VS. PRICE REGULATIONS

One of the most inconsistent policies of the program is that case where an exception has been granted by a pay board authorizing a hospital to exceed the 5.5 per cent limitation on wages, but where the pay exception is then not accepted on the price side as an allowable cost over the 5.5 per cent cost limitation. As recently as July 2, 1973, the Health Industry Wage and Salary Committee has again raised serious objection to this inconsistency and inequity with John Dunlop, chairman of the Cost of Living Council.

Recommendation :

That regulations be issued to establish that any exception granted by the Health Industry Wage and Salary Committee must be recognized on the price side as an allowable exception in determining allowable costs and allowable increased revenue. In addition, apparent violation stemming from an exception granted by the Health Industry Wage and Salary Committee should be waived.

V. "LOW WAGE" ALLOWANCE

The Low Wage provisions of the act permit a hospital to exceed the 5.5 per cent wage limitation where the excess is related to increases to employees earning less than \$3.50 per hour. While this is described as an allowable cost excess, the benefits of this pass through provision are *negated* by a further provision that this allowable excess cost cannot be used as justification for exceeding the 6 per cent limit on increased revenues. This inequity is being challenged in the Connecticut suit on the basis that it is contrary to the intent of the law. In addition, a group of Massachusetts hospitals and the Massachusetts Hospital Association is challenging this item through formal Requests for Ruling from the Internal Revenue Service.

Recommendation :

Since the wording of the act provides that the payment of wage increases to low-wage employees "shall not be limited in any manner", that regulations be retroactively implemented which allow this item as a true pass through into revenue.

VI. CAPITAL FINANCING

The effect of the Economic Stabilization Program on the capital financing in the hospital industry was the subject matter of a special study group sponsored by the American Hospital Association. The study group included representatives of the hospital industry, and financial representatives familiar with the hospital capital fund operations from the American Institute of Certified Public Accountants, major hospital bond underwriters and bond counsel.

VII. USE OF PER DIEM COST AS A PRICE

The current interpretation of the Cost of Living Council is to consider the effective per diem reimbursement rate for a fiscal year as a price to a cost reimbursement purchaser of care. Such a use of the per diem cost reimbursement as a price is an arbitrary and untrue indicator of true price increases for the following reasons :

The per diem is not intended to be a price, nor is it the basis for reimbursement. It is used merely as an approximate measure for interim advances to providers. Reimbursement is made by such purchasers on the basis of total cost, not per diem cost.

Using the per diem as a price completely ignores the fact that the per diem cost represents the average cost of a fluctuating and generally increasing quantity (or intensity) of services rendered to patients. Since the input of services reflected in the per diem cost is changing and increasing, it is inequitable to consider the increase in the per diem cost as an increase in the price for a single service. The average per diem cost of this year's product is not comparable to the average per diem cost of last year's product.

Recommendation :

That existing contractual relationships be followed in defining the price of services rendered. If the application of this implied definition results in a violation, corrective action to attain compliance should be applied to all purchasers prospectively.

VIII. PRICE/VOLUME/INTENSITY

The price control program has used aggregate annual revenues as its basic measurement criteria rather than the individual prices of individual services. Changes in aggregate annual revenue of one period compared to another are obviously affected by more than just *price* changes. The *type of products* sold in one period compared to another is a factor and the *quantity* of the products sold is the other factor. Properly identifying each of these three specific factors is critical in the program's aggregate annual revenues approach since the inappropriate identification of any one of these three items can bring about an inequitable and improper measurement.

Since the programs' objective is to control price increases only, then the exact amount of increased revenues due to price changes must be accurately identified.

The improper separation and recognition of these three distinct factors of revenue change is included in the issues of the Connecticut suit.

IX. UNRECOVERABLE ALLOWABLE COSTS

Present regulations limit the amount that a hospital can increase its revenue through price changes to 6 per cent of the prior year's revenues even though the hospital has a greater amount of allowable cost increases in compliance with all cost limitations. Under existing regulations a hospital with \$1,000,000 of prior year costs is entitled to a \$60,000 allowable cost increase (6 per cent increase). If this hospital's prior year revenues only amounted to \$900,000, its allowable price increases could not exceed \$54,000 (6 per cent of \$900,000) even though allowable costs were \$60,000.

Recommendation :

That a hospital be permitted to recover without an exception the full amount of its allowable cost increases through revenues even though the recovery of such allowable costs causes the 6 per cent limit on revenue increases to be exceeded.

X. NONRECOGNITION OF PREEXISTING AGREEMENTS

Many hospitals in the period prior to Phase I August 15, 1971, of the Economic Stabilization Program had agreed by negotiation contract or officially announced policy of instituting wage and salary increases or instituting price increases to cover new services or facilities that were completed or in the process of completion when price and other decisions were made. The effect of Phase I, Phase II and subsequent regulations issued under Phase III was to deny the hospital the ability to recover cost commitments in these areas where decisions had been made based upon circumstances not subject to the controls subsequently imposed.

Recommendation :

Permit those hospitals that can prove prior commitments in these areas to use the cost increases which they incurred as cost justification for price increases and to rescind existing orders to these hospitals to refund and rollback prices based upon the disallowance of these costs by administering agencies of the program.

XI. COST JUSTIFICATION OF FINAL SETTLEMENT AMOUNTS

It is the opinion of personnel in various IRS offices around the country that income which is received as the result of final settlement from cost based third party payors after hospital audit by these agencies is additional income to the hospital in the year received and as a result is additional income in that year and must be cost justified. Hospitals contend that this is an adjustment of prior years' activities and should only be applied to the year in which much additional income arose. In addition, Medicare intermediaries who were two or three years behind in their audits found it now beneficial to conduct multiple audits and produce multiple settlements during ESP years which in effect negated what price increases were implemented during an ESP year.

Recommendation :

That final settlement amounts received by a hospital be not considered as additional income to be cost justified in the year in which received but only to be considered an adjustment of prior years' activity from which the amount originated and that the Profit Margin calculation on the S-52 be the only figure affected by such recognition.

XII. DISCRIMINATION ASPECT OF 2.7 PER CENT RULING

One of the last official proposals made by the old Price Commission to the Cost of Living Council was to combine the 2.5 per cent non-wage expense cap and the 1.7 per cent New Technology cap into one overall percentage for non-wage expenses. This proposal in effect created a non-wage expense cap of 2.7 per cent of the prior year's expenses or 6.75 per cent of the prior year's non-wage expenses for an individual hospital. The proposal was made in recognition of the total inadequacy of the 2.5 per cent non-wage expense factor originally promulgated by the Cost of Living Council on December 29, 1971.

The change in the regulations was effective for fiscal years beginning January 1, 1973, or thereafter. The effect of this implementation date created separate standards for hospitals with calendar fiscal years, who now could use 6.75 per cent of non-wage expenses as justification for price increases, as opposed to hospitals whose fiscal years beginning July 1, 1972, or October 1, 1972, who were still subject to the inequitable 2.5 per cent non-wage internal cost cap for price increase purposes.

Recommendation :

That the Cost of Living Council amend its order to permit the application of the new 2.7 per cent cap to fiscal years in progress on January 1, 1973.

SEPTEMBER 5, 1973.

STATEMENT OF THE AMERICAN NURSING HOME ASSOCIATION¹

The American Nursing Home Association ("ANHA") is a nonprofit organization which represents approximately 7,000 nursing homes throughout the United States with more than 500,000 patient beds. It is the nation's largest nursing home organization, with a membership that consists of proprietary and non-proprietary homes, single homes, and multi-facility operations.

ANHA is dedicated to the development and maintenance of high standards of professional care and administration in all licensed health care facilities, and to the promotion of the enactment of laws and regulations in furtherance of this objective. Today, there is a crisis in the nursing home industry—a crisis which has been precipitated by the manner in which the Economic Stabilization Program is being applied to the nursing home industry.

Substantially all ANHA members participate in either, or both, the Medicare and Medicaid programs established by the Congress under Titles XVIII and XIX of the Social Security Act to provide medical care for the aged, blind, disabled, and medically needy. Under these programs, nursing homes provide convalescent or inpatient care to persons not requiring hospital care, but needing certain medical care and services that cannot be provided in their homes or in custodial facilities. In fiscal year 1974, Medicare will help to meet the medical costs of 11.6 million aged and disabled Americans. Medicaid will help to pay for medical care provided to 27 million low income people in the country.

Of the total revenues received by the nursing home industry, 75% are from public sources, such as the Medicare and Medicaid programs, which are received in the form of cost reimbursement. Funds for the programs are appropriated by Federal and state governments.

Title XVIII provides that payments to nursing homes for services covered by the Medicare program and related to the patient's care are to be the reasonable cost for such services. The Federal government's commitment to pay the home the cost incurred for nursing services is contained in a written agreement with the Secretary of HEW. Under Title XIX, the exact amount of the Medicaid payment to a home is established by the state, subject to a ceiling which provides that the state cannot pay more for medical care and services than the reasonable cost reimbursement for comparable services under Medicare. Agreements exist between the homes and the individual states under which a state agrees to pay the home for skilled nursing services in accordance with the method contained in the state Medicaid plan, and the home agrees to accept this payment in full for the care of the patient.

Within this statutory framework is created a highly complex system of cost controls. The amount of reimbursement for services under these programs is controlled by Federal and state legislative and budgetary bodies, by the rules

¹ Court cases involving nursing homes are printed on p. 376.

and regulations of the Social Security Administration, and various state health and welfare agencies. Under Medicare, for example, within 90 days after the close of an accounting year, a skilled nursing facility is required to file an annual report of its costs which is subject to audit, to determine the amounts due the facility for services to Medicare beneficiaries. Regulations issued by HEW provide for retroactive corrective adjustments where, for any fiscal period, the total reimbursements proves to be either inadequate or excessive.

The Cost of Living Council, by administrative regulations, has imposed yet another level of Federal controls on this industry which appears to be without any factual or legal basis, and in direct conflict with the statutory language of Titles XVIII and XIX of the Social Security Act. This action threatens the well-being of nursing homes in the United States and the patients who must look to these facilities for essential medical care and treatment.

The gravamen of the problem lies in the fact that the Cost of Living Council treats any increase in the amount of cost reimbursement under Medicare and Medicaid as a price increase. The nursing home, in turn, is subject to an overall revenue limitation from price increases. Any increase in reimbursement which would result in an increase in revenues of more than 2.5%, but not more than 6%, of the home's annual revenues in the last fiscal year must be reported to the Cost of Living Council. Any increase in reimbursement which would result in an increase in revenues in excess of 6% cannot be implemented unless an exception is granted by the Cost of Living Council.

These requirements are contained in a Form S-52 (Income and Expense Analysis for Hospitals and Other Institutional Health Service Providers), and related schedules, which have been adopted by the Council. The Form must be used by all nursing homes, regardless of size, revenues or employees, to determine whether increased reimbursement is permitted by the stabilization regulations and to request exceptions from the revenue limitations.

The simplest way to understand the administrative burden created by this Form, is to examine it. For that purpose, we have attached to our statement a copy of the Form and its related schedules and instructions as Exhibit A. With even a cursory examination, it is obvious—the Form cannot be completed by a layman. Depending upon the size of the nursing home, its geographic location, and the familiarity of the home's present accountant or attorney with the Form, the cost of preparing it for reporting and/or exception purposes ranges from \$1,000 to \$2,500. Moreover, this cost does not apply to just a few homes.

Take the typical situation. Recently, a number of states, in recognition that their Medicaid rate of reimbursement was less than the nursing home's actual cost for providing the required services, have directed their welfare departments or other state agencies to increase the state Medicaid rate, and being reimbursing nursing homes on a current cost basis. Funds have been appropriated by the state legislature for such a purpose. However, because of the Council's revenue limitations, no home in the state may accept the rate increase unless it has received approval from the Cost of Living Council. This means that each Medicaid home in the state must seek an exception—at a cost per home of \$1,000 to \$2,500. Considering the number of nursing homes in a given state, it is not difficult to forecast the amount of the cost involved.

To compound matters, the administrative procedure followed by the Council contains no time limit in which it must respond or act on requests for exception. Because nursing homes are in the unique situation of having first incurred costs for which they must seek a determination as to whether they can be reimbursed for such costs, a particular home may find its resources exhausted before the Council gets around to acting on its request. Additionally, the standards under which any of these exception requests are to be evaluated have never been clearly defined. Is a "serious hardship or gross inequity" in a nursing home the brink of bankruptcy, the closing of the home, or a severe cash flow problem? We know from the reports of our members that a home operating at a loss, has been required under existing guidelines to continue to operate at a loss, so apparently financial losses are not enough—although if not reversed bankruptcy is inevitable.

The shifting of price control authority through Phases I, II, III, III-½ and IV has created additional problems. Under Phase IV, the reporting and exception activities were transferred from the Internal Revenue Service to the Cost of Living Council. This has caused delays in communication, serious time lags, the absence of a familiarity with the rules, and a lack of consistency in interpretation. As one example, we are aware that the Colorado State Advisory Board (state advisory boards were constituted in each state for the purpose of reviewing

exception requests and making recommendations to the Council), was required to telephone the Cost of Living Council office in Washington, D.C. many times in an effort to obtain answers to previous correspondence. Upon finally contacting someone on one occasion, they were advised that the answer they were seeking had been on a desk for 12 days waiting for someone to be authorized to sign it. As a result, a member of the Board made a trip to Washington to obtain whatever information was available so that the State would know how to maintain a reasonable degree of compliance. Although appointments were made, upon arrival the individuals in the Council able to make the necessary decisions were out of the city and the trip was fruitless.

So that this Committee will not be led into believing that state action is an alternative to individual homes seeking exceptions to receive increased reimbursement under Medicaid, as we have heard voiced by members of the Council staff from time to time, it is well to mention a few of the problems individual states have experienced.

Present Council regulations provide that a nursing home in a state may accept increased reimbursement for health care to Medicaid patients when the state or its agent certifies that the new reimbursement is based upon uniform rates set by the state, the increase is cost related, the increase is necessary to maintain the minimum standards of service required by Federal or state regulations, or both; and the increase is not inflationary within the meaning of the Economic Stabilization Program guidelines. To our knowledge, the states' experience with this procedure has been unnecessarily expensive, time consuming, and, in large part, unsuccessful.

Florida, for example, was operating under the assumption that the Cost of Living Council had designated it as a uniform rate state, when, in May of 1973, it was advised to the contrary. Because of this ruling, nursing homes in Florida were unable to accept additional Medicaid reimbursement that had been appropriated by the state legislature. In order to get the Cost of Living Council to change their ruling, it was necessary for Florida to hire special legal counsel in Washington to handle the matter.

In Oregon, after vigorous efforts on the part of the Oregon legislature, the Governor, and the Welfare Division, new Medicaid rates were adopted to be effective July 1, 1973, to bring reimbursement up to current cost levels. The State Welfare Department then announced in July of 1973 that the rates may not be in compliance with the Economic Stabilization Regulations and all nursing homes in Oregon were advised to seek individual determinations. In an effort to eliminate the tremendous cost of individual filings, the Oregon Health Care Association undertook to obtain Cost of Living Council approval of this increased reimbursement. It was not until an enraged delegation from the Oregon Health Care Association traveled to Washington in September of 1973 to confront the Executive Director of Health of the Cost of Living Council that a resolution was forthcoming.

Minnesota offers another classic case history of the problems encountered in this area. In December of 1972 nursing homes in Minnesota requested a ruling whereby the provisions of the uniform rate reimbursement might be made available to nursing homes in Minnesota. The request by the nursing homes contained letters from the Commissioner of the Minnesota Department of Public Welfare stating that the Department was willing and ready to serve as certifying agent. Meetings were held between representatives of the nursing homes and the Cost of Living Council staff to provide all information necessary to accurately reflect the conditions set forth in the regulations as they might apply to Minnesota. Approximately two and one-half months later, the Council denied the nursing home's request, and the request of the Department to act as a certifying agent. In March of 1973, the Department joined in a request with the homes for reconsideration of the decision, and requested an oral argument and the opportunity to submit briefs. Notwithstanding the urgency of the matter, the State health officials were advised that it would probably be months before any action could be taken on the request for reconsideration. In June of 1973, two months later, the Cost of Living Council advised that the request for a hearing would not be granted. In July of 1973, the request for reconsideration was supplemented in an effort to obtain a hearing, which called to the Cost of Living Council's attention the fact that the Department had invested a tremendous amount of money and time in establishing and revising its nursing home rate setting rules. In August of 1973, the fact that another month had gone by without any response

was called to the Council's attention. Approximately ten months from the original submission of the request, September of 1973, the parties were advised that their request was denied.

Illinois provides another example. In June of 1973, the Illinois Department of Public Aid advised the Cost of Living Council that it planned to increase rates of reimbursement under Medicaid. The new rates were set by the Illinois Department of Public Aid and were uniform within cost regions. The proposed increase was certified to be cost related as a result of wage and price increases within the past year. The increase was certified as being necessary to maintain the minimum standards of service required by both Federal and state regulations, and necessary to allow the state to continue to obtain health care services for its eligible beneficiaries at an acceptable level. The cost estimates were obtained from a survey by the American Management System, an independent organization, to insure the accuracy of the information. In July of 1973, the Illinois Department of Public Aid was advised that because of the 60 day freeze on prices then in effect, the Cost of Living Council could not authorize any price increases. Additionally, the State was advised that a preliminary reading of its letter indicated that it did not contain all of the information required for uniform rate certification. Upon receipt of additional information, and the announcement of Phase IV, Illinois was advised that the Cost of Living Council would open a formal case on their request for certification. Illinois immediately responded with information from the Department of Public Aid on July 20, 1973, which provided what was understood to be the additional information requested, and urged the Cost of Living Council to act so that the approved increase might be effective July 1, 1973. Illinois has now been requested to submit additional information.

Timeliness is critical in all of these situations. If nursing homes are prevented from obtaining reimbursement for their current costs of patient care, it is inevitable that a reduction in the quality of patient care will result, or the homes will be forced out of business for lack of revenues. Clearly, the nursing home industry suffers. But, so does the patient—the medically infirm, the senile, the blind or disabled. In fiscal year 1974, more than 38.6 million Americans will be affected by the operation of the Medicare and Medicaid programs. It is the patient who suffers if movements to other facilities are required because one must close down because of an inability to obtain relief through a simple exception request from the Cost of Living Council. Or, an entire state Medicaid program is in chaos if a state is unable to obtain advice so that it might effectively run its program.

Of an even greater consequence, is the fact that the administrative burdens created by the Economic Stabilization Program divert tremendous sums of money and time away from providing a higher level of patient care.

There is also a serious constitutional question in the administration of the Economic Stabilization Program—which strikes at the very heart of the principle of separation of powers. The Medicare and Medicaid programs have been established by Congress to provide medical care for a large segment of the population of this country. Standards for eligibility, the levels of care to be provided, the administration of the programs, and the funding for the programs, have been set by Congress. The previously described actions of the Cost of Living Council to control the amount of reimbursement under these programs is a direct interference by the Executive Branch with the contractual obligations established under these programs. It is ANHA's position that such action is prohibited, not only by Titles XVIII and XIX of the Social Security Act, but by the plain language of the Economic Stabilization Act. The extent of our conviction on the unlawfulness of this conduct is evidenced by our filing of a law suit in the District of Columbia to enjoin such interference.

As this Committee is aware, the Economic Stabilization Act was amended in 1973 to clearly express a concern of the Congress that the Act was not to be construed as authorizing the Executive Branch to interfere with funds obligated by contract by the Congress. This concern grew out of a report submitted to Congress by the Office of Management and Budget which cited the Act as legal justification for the President's action in curtailing and cutting of various housing programs. The Senate Committee on Banking, Housing and Urban Affairs in its report on the 1973 amendments made it clear that Congress in passing the Economic Stabilization Act did not intend to provide a legal basis for the Executive Branch to curtail funds for programs legislated by the Congress, when it stated in its report:

"The Committee by a vote of 12 yeas to 4 nays agreed to include in the bill an amendment designed to make it clear that it was not the intent of Congress for the Economic Stabilization Act, as amended, to authorize or require the President to be the authority or to authorize or require the President to impound or withhold funds appropriated, authorized, or authorized to be obligated by contract by the Congress. This amendment is Section 5 of the bill." S. Rep. No. 93-63, 93rd Cong., 1st Sess. (1973). (U.S. Code Cong. & Adm. News, 93rd Cong., 1st Sess., P.L. 93-28, pp. 1122-23).

The 1973 Amendments added § 203(j) which provides :

"Nothing in this title may be construed to authorize or require the withholding or reservation of any obligational authority provided by law or of any funds appropriated under such authority."

Stripped of the complexities of the programs, the analysis is quite simple. Congress has established the Medicare and Medicaid programs by legislation. It has mandated certain levels of patient care to be provided, and authorized funds to pay for such care. State legislatures appropriate funds for their portion of the Medicaid reimbursement. The Secretary of HEW in the case of Medicare, and recipient states under Medicaid, have entered into binding contracts under which they are obligated to reimburse participating nursing homes for the services which are rendered to eligible beneficiaries. The Cost of Living Council, however, has assumed the role of determining when, if ever, the homes will be reimbursed for these obligations which HEW and the states have incurred.

We believe that Congress never intended such a result, and urge this Committee to take whatever measures are necessary to prevent this unwarranted action.

Respectfully submitted,

DR. THOMAS G. BELL,
Executive Vice President.

Enclosure.

Form **S-52**
(Rev. July 1973)

Economic Stabilization Program
Income and Expense Analysis for
Hospitals and Other Institutional Health Services Providers

Official Use Only
 Control Number

Part I. — Identifying Data (Please complete requested items and check applicable boxes below.)

1(a) Name of institution Address (number and street) City or town, State and ZIP code	2(a) Name of parent firm (if applicable) Address (number and street) City or town, State and ZIP code
(b) Institution is ☐ Profit ☐ Nonprofit (c) Institution is ☐ Acute hospital ☐ Other ▶	(b) Parent firm is ☐ Profit ☐ Nonprofit

3(a) Is this a request for exception? ☐ Yes ☐ No
 If "Yes," it is not necessary for you to complete Part VIII of this form; however, attach a Schedule A and Form S-16.

(b) Is this a report of a price increase? ☐ Yes ☐ No
 If "Yes," attach Schedule A.

(c) Is this a required quarterly report? ☐ Yes ☐ No
 If "Yes," what quarter does this report cover? ☐ First ☐ Second ☐ Third ☐ Fourth
 When does your fiscal year end (month, day, and year)? ▶ (Attach Schedule A)

(d) Have you previously filed a request for exception with the IRS, Price Commission, or Cost of Living Council? ☐ Yes ☐ No
 If "Yes," attach a statement of details, and copies of all Decisions and Orders received.

(e) Have you previously filed a report with the IRS of a price increase that requires no exception? ☐ Yes ☐ No
 If "Yes," attach a statement of details.

(f) What is the effective date of the proposed price increase (month, day, and year)? ▶
 If more than one, what are the dates of each? ▶

Part II. — Aggregate Annual Revenues (See instructions)

	Actual LFY (a)	Budgeted FY at LFY prices plus new services (b)	Budgeted FY at proposed prices (include new services (c)
4 Routine services	\$	\$	\$
5 Ancillary services			
6 Professional fees			
7 Total patient service revenues (sum of items 4, 5, and 6)			
8 Allowances (all kinds, including contractual, courtesy, employee, charity, etc.) and bad debts			
9 Net patient service revenues (item 7 less item 8)			
10 Other operating revenues			
11 Revenues from taxes or appropriations (government institutions or hospital districts)			
12 Aggregate annual revenues (sum of items 9, 10, and 11)	\$	\$	\$

(Note: Column (b) of item 12 represents the aggregate annual revenues you would realize in the budgeted fiscal year if you charged the same prices as in the last fiscal year.)

Part III. — Census Data (See instructions)

13 Census data	FY ending (mo., day, year) (a)	Inpatient admissions (b)	Inpatient costs (c)	Outpatient procedures (d)	Outpatient costs (e)	Patient days Available (f)	Patient days Actual (g)	Percent of occupancy (h)
A. Actual (last year)			\$		\$			
B. Projected (for price increase fiscal year)			\$		\$			

14 Check (a) or (b) below to show the method used to adjust cost increases to reflect volume changes.

(a) ☐ Actual budget data(b) ☐ Volume index

(c) If you use the volume index, what is its computed value? ▶

Part IV. — Operating Costs (See instructions)		Actual — last fiscal year Volume Index (a)	Budgeted fiscal year (b)	Adjusted costs (last fiscal year costs at projected volume) (c)	Change due to cost (column (b) minus column (c)) (d)
15 (a) Low wage and pre-existing contract excesses (see instructions)			\$		\$
(b) Other wages/salaries		\$	\$		
16 Fringe benefits					
17 Total wage/salary expenses (item 15 plus item 16) (carry the amount shown in col. (d) to item 35)		\$	\$	\$	\$
18 (a) Pensions, group insurance, disability and health plans		\$	\$	\$	\$
(b) FICA and unemployment taxes					
19 Commissions and fees paid to hospital-based physicians					
20 Drugs					
21 Raw food (or dietary service)					
22 Utilities					
23 Special purpose (attach documentation)					
24 Other expenses (attach documentation)					
25 Depreciation					
26 Interest					
27 Insurance					
28 Total nonwage/salary expenses (sum of items 18 through 27)		\$	\$	\$	\$
29 Total wage/salary and nonwage/salary expenses (item 17 plus item 28)		\$	\$	\$	\$
30 Expenses projected for price increase year for new technology:					
(a) Salaries			\$		
(b) Supplies and other					
(c) Depreciation					
(d) Total			\$		
31 Charges to persons benefiting directly from such facilities or services			\$		
32 Net new technology expenses (item 30 less item 31) (if negative, enter zero; also show this amount in item 43)					\$
33 (a) Total projected expenses (item 29, col. (b) plus item 30(d)) (also show this amount in item 80)				\$	
(b) Adjusted cost changes (sum of items 29, col. (d) and 32)					\$
Note: Attach a description of the new technology.					

Part V. — Price Increases Subject to Exception (See instructions)**Wages and Salary Cost Increases**

	Limitation (a)	Actual (b)	Allowable (c)	Excess (d)
34 Limitation (item 17, col. (a) $\times$ 5.5%)	\$			
35 Actual (from item 17, col. (d))		\$		
36 Allowable (lesser of items 34 or 35; if negative, enter zero)			\$	
37 Excess over allowable (item 35 less item 36)				\$

Nonwage Cost Increases

38 Limitation (item 28, col. (a) $\times$ 2.5%, except for FY beginning on or after 1/1/73 enter item 29, col. (a) $\times$ 2.7%)	\$			
39 Actual (item 28, col. (d), except for FY beginning on or after 1/1/73 enter the sum of item 28, col. (d) and item 32)		\$		
40 Allowable (lesser of items 38 or 39; if negative, enter zero)			\$	
41 Excess over allowable (item 39 less item 40)				\$

Net New Technology Cost Increases (only for FY beginning before 1/1/73)

42 Limitation (item 29, col. (a) $\times$ 1.7%)	\$			
43 Actual (from item 32)		\$		
44 Allowable (lesser of items 42 or 43; if negative, enter zero)			\$	
45 Excess over allowable (item 43 less item 44)				\$
46 Totals	\$	\$	\$	\$
47 Enter the lesser of col. (b) or col. (c) of item 46				\$

Spillover and Pass-Throughs:**Low Wage and Pre-Existing Contract Pass-Throughs**

48 Enter the lesser of item 15(a), col. (d) or item 37 (but not less than zero)				\$
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Pensions and Group Insurance Spillover

49 Enter the lesser of item 41 or the excess of item 18(a), col. (d) over item 38 (but not less than zero)				\$
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FICA Pass-Through

50 Subtract item 49 from item 41 and enter results (if negative, enter zero)	►	\$		\$
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51 Enter the lesser of item 50 or item 18(b), col. (d) (but not less than zero)				\$
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52 Total (sum of items 47, 48, 49 and 51)				\$
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53 Maximum allowable cost increases (item 12, col. (a) 6%)				\$
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54 Justified allowable cost increases (part of items 46, col. (b); 52 or 53; if negative, enter zero) (carry the amount shown to item 72)				\$
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55 Express item 54 as a percentage of AAR in last FY (item 54 $\div$ item 12, col. (a))	►	%		\$
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56 Cost increases in excess of allowable (item 46, col. (b) less item 54)				\$
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57 Annualized increase in AAR resulting from price increases implemented to date in budgeted FY (see instructions)	►	% or		\$
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58 Annualized amount of additional AAR proposed as a result of price increases in the budgeted FY (see instructions)	►	% or		\$
--	---	------	--	----

59 Total increase in AAR due to price (sum of items 57 and 58)	►	% or		\$
--	---	------	--	----

60 (a) Amount of price increase subject to exception (see instructions)				\$
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(b) Express item 60(a) as a percentage of AAR in last FY (item 60(a) $\div$ item 12, col. (a))	►	%		
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Part VI. — Base Period Margin Limitation (See instructions)

	1st Selected base year ended (/ /) (a)	2nd Selected base year ended (/ /) (b)	Budgeted FY ended (/ /) (c)
61 Aggregate annual revenues (in col. (c) show the amount entered in item 12, col. (c))	\$	\$	\$
62 Total expenses (in col. (c) show the amount entered in item 33(a))	\$	\$	\$
63 Net revenues (item 61 less item 62)	\$	\$	\$
64 Budgeted fiscal year net revenue (or profit) margin (item 63 $\div$ item 61)	►	%	

Total of Two Selected Base Years

65 Aggregate annual revenues (sum of item 61, col. (a) and 61, col. (b))			\$
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66 Net revenues (sum of item 63, col. (a) and 63, col. (b))			\$
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67 (a) Base period net revenue (or profit) margin (item 66 $\div$ item 65)	►	%	
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(b) Adjusted base period net revenue (or profit) margin granted by prior exception. (If no adjustment has been made, leave blank)	►	%	
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68 If this is a request to adjust the base period net revenue or profit margin, enter the requested margin	►	%	
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Part VII. — Productivity Data	Total man hours (a)	Man hours per patient day (b)
69 Projected for budgeted fiscal year (excluding new technology)		
70 Actual for last fiscal year		
71 Increase (decrease) (item 69 less item 70)		

Part VIII. — Compliance, Quarterly Reporting, and Self-Monitoring

Note: DO NOT complete this part if this is an exception request. Otherwise, complete this part and attach Schedule A as supporting documentation.

Section 1 — 8FY Allowable Cost Justification and Annualized Price Increase Revenues

72 Justified allowable cost increases per regulations (from item 54)	\$
73 Annualized amount of revenues granted by exception	\$
74 Total annualized price increase revenues authorized in the BFY (item 72 plus item 73)	\$
75 Amount of annualized price increase revenues resulting from implemented price increases (Schedule A, Part II, line 6, col. (i))	\$
76 Is item 75 greater than item 74?	☐ Yes ☐ No
If "Yes," corrective action may be required. Contact your IRS District Director for assistance.	

Section 2 — BFY Net Revenue (Profit) Margin and the Base Period Margin Limitation

77 Total price increase revenues realized (and to be realized) in the BFY (Schedule A, Part II, line 6, col. (m))	\$
78 8FY AAR excluding price increase revenues (item 12, col. (b))	\$
79 Realized BFY AAR (item 77 plus item 78. This amount must agree with item 12, col. (c))	\$
80 BFY operating expenses (from item 33(a))	\$
81 8FY net revenues or profit (item 79 less item 80)	\$
82 BFY net revenue or profit margin (item 81 ÷ item 79)	%
83 Base period net revenue or profit margin (item 67(a) or (b), whichever is greater)	%
84 Is item 82 greater than item 83?	☐ Yes ☐ No
If "Yes," corrective action may be required. Contact your IRS District Director for assistance.	

Part IX. — Books and Records

85 The maintenance of books and records is required for possible inspection and verification of all price changes after November 12, 1971. Books and records are located at ►

Part X. — Certification and Signature

I certify that I have read the applicable price stabilization regulations and all instructions printed with this form. I have reviewed all information recorded on this form and all attached schedules and other supporting documentation. I believe the information furnished is factually correct and in accordance with the applicable regulations and instructions.

86 Typed name and title of chief executive or authorized official

87 Signature	88 Telephone number	89 Date
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Instructions for Form S-52

Revised July 1973

Who Uses Form S-52.—If you are an institutional provider of health services, use Form S-52 to determine whether proposed price increases are permitted under Economic Stabilization regulations.

Also use Form S-52 as part of the documentation when you report a price increase or request an exception, and for computing allowable cost justification for the purpose of self-monitoring and compliance.

What Form S-52 You Should Use.—If your budgeted fiscal year ended before July 1, 1973, use Form S-52 (Revised September 1972).

If your budgeted fiscal year began on or after July 1, 1973, use Form S-52 (Revised July 1973).

If your budgeted fiscal year included both June 30 and July 1, 1973, you may, at your option, use either the July 1973 or the September 1972 version of Form S-52 as part of your documentation for reporting price increases (if you are required to report), or as a supplement to Form S-16 if you request an exception.

If you have an option to use either the July 1973 or September 1972 version of the form, you must continue to use the same version you have chosen for any subsequent filings during the rest of the budgeted fiscal year, because an Internal Revenue Service (IRS) compliance audit will be based on that version of the form. (The format for calculating allowable cost justification is found in Part V of the July 1973 version of the form. If you use the September 1972 version, compute cost increases in Part III of the September version, but compute allowable costs using the format of Part V of the July 1973 version. You may use the Addendum to Form S-52 (Rev. September 1972), available from your local IRS office, for computing allowable costs. Note that line item numbers on the July 1973 version of Form S-52 do not correspond to the same items on the September 1972 version.)

General Instructions

Prepare a Form S-52 for each separate and distinct individual health care provider, regardless of its organizational affiliation or fiscal support. If you are a hospital which also operates a skilled nursing or extended or intermediate care facility on the same premises, you may, at your option, treat the hospital (including all outpatient facilities) as one institution. The skilled nursing (including extended and intermediate care) section may be treated as a separate institution. If accounting records are sufficiently differentiated. Once the decision has been

made to separate the institutions, each must separately comply with all provisions of the regulations. Nonoperating revenue and expenditures must be allocated consistently from year to year.

If you operate an outpatient facility, it may not be considered a separate and distinct institutional provider. The outpatient facility will be considered either an integral part of its institutional operator or as a noninstitutional provider. The Internal Revenue Service and/or the Cost of Living Council reserves the right in each case to determine: (1) the reporting status of particular facilities based on the merits of the individual circumstances; and (2) the appropriateness of allocated revenues and expenditures, both operating and nonoperating.

The fact that the allowable cost limitations of 6 CFR 300.18(d) have been exceeded does not require an exception unless such excesses are used to cost justify an annualized increase in aggregate annual revenues due to price.

Definitions.—An institutional health care provider is any organization which operates licensed 24-hour inpatient health care facilities.

For purposes of the Economic Stabilization regulations, "inpatient health care" is defined as the diagnosis, cure, mitigation, and treatment of disease for residents. This care does not include care in a convalescent home, a home for children or the aged, or institutions whose principal purposes or functions are to train handicapped persons to pursue a vocation.

Institutional providers of health services include but are not limited to: medical hospitals; psychiatric hospitals or asylums; tuberculosis hospital sanatoria providing medical care; clinics and dispensaries operated by hospitals or other institutional health providers; nurses' training schools operated by hospitals or other institutional health providers; skilled nursing homes; and extended and intermediate care facilities.

The budgeted fiscal year (abbreviated as BFY) refers to the year under determination. It is the price increase year for which you request exception, file a report, or on which a compliance determination is made. If you are completing a year-end annual report, the budgeted fiscal year (or BFY) on Form S-52 and Schedule A refers to the year for which the annual report is being made.

The last fiscal year (abbreviated as LFY) is the fiscal year immediately preceding the budgeted fiscal year.

Aggregate annual revenues is defined in 6 CFR 300.18(a) and is abbreviated as AAR.

Filing for Exception.—Use Form S-52 with Form S-16, Application for Exemption or Exception, (file both in duplicate) when you request an exception to the Economic Stabilization regulations. Also include the following financial information, prepared (if possible) in accordance with the American Institute of Certified Public Accountants' (A.I.C.P.A.) Hospital Audit Guide:

1. Certified financial statements for the last three fiscal years and any other year selected as the base period year. (Certification by an independent audit is not required if that audit has not already been done.)

2. Detailed statements of changes in financial position for all funds for the last fiscal year.

3. A completed Form S-52 for the last fiscal year, using actual data through the end of the last fiscal year for revenues, expenses and census information.

4. Detailed cash budget for both the last fiscal year and the budgeted fiscal year to include:

- a. A separate itemization of donor-restricted and donor-unrestricted nonoperating cash income from gifts, contributions, endowments, and investment income. A detailed explanation of the nature of the donor restriction must be provided; i.e., to what use is such income restricted.

- b. All nonoperating income including that from taxes and appropriations. Nonoperating tax or appropriation income excludes appropriation income directly related to services rendered.

- c. An itemization of all nonoperating cash requirements including those for principal payments on long-term debt, scheduled capital replacement (to exclude new technology and capital expansion) and dividend requirements.

The regulations provide no automatic relief from operating losses incurred by health care institutions. If you want relief in the form of price increases in excess of those authorized by the regulations, you must file an exception request. Parts V and VI of Form S-52 (Rev. July 73) will help you determine whether you need to file for an exception.

Where to File.—If the annualized percentage increase in price increase revenues (item 59 of Form S-52 (Rev. July 73)) in the budgeted fiscal year exceeds or will exceed 6 percent of aggregate annual revenues in the last fiscal year, file the exception request with your District Director of Internal Revenue Service. The District Director will forward the request to the State Advisory Board (SAB). The SAB recommendation will not be required if the SAB fails to make it within 30 days of receipt from IRS, as required by 6 CFR 300.18(c)(2).

If the budgeted fiscal year annualized percentage increase in price increase revenues is or will be 6 percent or less of aggregate annual revenues in the last fiscal year and you still need an exception to either the allowable cost limitations specified by 6 CFR 300.18(d), or the base period net revenue or profit margin specified by 6 CFR 300.18(b), file the request with IRS. You may withdraw it any time before a decision is reached.

Reporting Price Increases.—Prepare Schedule A to report price increases and price increase revenues, and use Form S-52 to report the allowable cost justification for those price increases. Furnish a complete set of these to the District Director of the IRS, and to the Medicare Intermediary.

Pursuant to 6 CFR 300.18, if price increases that you are implementing will not cause you to exceed your base period net revenue or profit margin (Part VI of Form S-52 (Rev. July 73)) or your allowable cost limitation (Part V of Form S-52 (Rev. July 73)), please use the following procedures:

1. If the price increases result, on an annualized basis, in price increase revenues of $2\frac{1}{2}$ percent or less of aggregate annual revenues in the last fiscal year, no report is necessary.

2. If the price increases result, on an annualized basis, in price increase revenues of more than $2\frac{1}{2}$ percent but not more than 6 percent of aggregate annual revenues in the last fiscal year, notify the District Director of the Internal Revenue Service and the Medicare Intermediary before implementing the increases.

All other price increases require that an exception be granted before implementation. While you wait for a decision on the requested exception, you may implement only that portion of the requested price increase to which you are entitled under the Economic Stabilization regulations.

Cost Justification of Annualized Price Increases.—For purposes of the Economic Stabilization Program, all price increases must be cost justified. The 6 percent allowable increase in aggregate annual revenue is a limitation rather than an automatic allowance. For example, if the total amount of allowable cost increases are equivalent to 4.5 percent of the aggregate annual revenues realized in the last fiscal year, and the budgeted revenue increase resulting from price increases is 5.2 percent (annualized), the annualized revenue increase allowable without an exception would be limited to the level of allowable cost justification (4.5 percent).

How to Self-Monitor to Check Compliance.—Normally, you will complete Form S-52 and Schedule A before the start of the year in which the price increase is to be made. Revenues, expenses, and census data are all on a projected basis. Therefore, you should check at least quarterly to determine whether your projections appear to be correct; whether the price increases instituted are producing the expected level of revenues; and whether adjustments to your pricing structure might be required to ensure continued compliance with Economic Stabilization regulations.

As each fiscal quarter of the budgeted fiscal year is ended, complete a new Form S-52 and Schedule A. More frequent monitoring might be advisable. Replace budgeted figures used in the original Form S-52 with a combination of actual figures for that portion of the year completed and the revised (if necessary) projections for the remaining quarters. If you used the volume index method of adjusting costs, recompute the index, because variations in census data will

alter the value of the index as well as the amounts shown as cost increases in column (d) of items 15 through 24 on Form S-52 (Rev. July 73). Make your final check at the end of the budgeted fiscal year when all projected figures are replaced with actual figures.

Use Schedule A to compute the annualized effect of price increases. "Total Annual Units," (col. h), will be a combination of actual units of service rendered from the first day of the budgeted fiscal year through the last day of the last completed quarter, and the projected units of service for the remaining quarters of the budgeted fiscal year.

Compare the total annualized price increase revenues for the budgeted fiscal year with the amount shown in item 54 of the Form S-52 (Rev. July 73), plus the dollar amount of any exception granted for the budgeted fiscal year. If the annualized price increase revenues are less than or equal to item 54 (plus the exception, if any) AND you have not exceeded your base period net revenue or profit margin, you would appear to be in compliance with the Economic Stabilization regulations. If your annualized price increase revenues are greater than item 54 plus the amount of any exception, AND/OR you have exceeded (or will exceed by the end of the year) your base period net revenue or profit margin, you may not be in compliance with the regulations. You should immediately determine what corrective action is necessary, if any, and notify the District Director of the Internal Revenue Service of any such action. Part VIII of Form S-52 (Rev. July 73) will help you determine whether there is a need for corrective action.

Quarterly Reports.—When you are required to make quarterly reports, submit a new Form S-52 and Schedule A to report both annualized and realized price increase revenues, and cost justification. Part VIII of Form S-52 must be completed. See instructions to Schedule A for more details. Unless otherwise specified in a Decision and Order requiring such reports, file the reports with the District Director of the Internal Revenue Service no later than 45 days after the end of the fiscal quarter being reported. The Cost of Living Council and/or the Internal Revenue Service in each case may require any other information deemed necessary for the effective administration of the Economic Stabilization Program.

Annual Reports to Check Compliance.—Each provider charging any price above the base price should complete Form S-52 and Schedule A when final figures for the fiscal year are available. If you are required to report (see instructions to Schedule A for details), complete these forms and submit them to the District Director of the Internal Revenue Service within 90 days of the end of the fiscal year, and include copies of the financial statements for the year.

Specific Instructions for Form S-52 (Rev. July 73)

We have not given you instructions for those items on Form S-52 and Schedule A which are self-explanatory or fully explained. Use generally accepted ac-

counting principles to report revenues and expenses, except where specifically modified by these instructions for Form S-52 or where law or custom requires use of the cash basis of accounting. (See the Hospital Audit Guide of the American Institute of Certified Public Accountants and pronouncements of the Accounting Principles Board (APB) of the A.I.C.P.A.)

Certain providers may find it necessary to adjust or restate base period revenues and expenses to reflect comparable data to conform with the accounting principles contained in the A.I.C.P.A. Hospital Audit Guide.

Part I Self-Explanatory

Part II Aggregate Annual Revenues

Your operating revenues consist of revenues from all sources as defined under Aggregate Annual Revenues by 6 CFR 300.18(a), including any patient service revenues related to new technology or derived from new services. Do not include as a part of the aggregate annual revenues those revenues received from research activities. Since both revenues and expenses for research are excluded from this form, if you wish to use a net loss on research activities as part of a claim to serious hardship, report these factors in separate documentation.

Instructions by columns and items follow. Please read the instructions for item 9 before you complete this part.

Column (a).—Enter actual revenues (exclude research revenues) from the last fiscal year; i.e., the most recently completed fiscal year. The last fiscal year is always the year immediately preceding the year in which the price increase is or will be made.

When you are in the fourth quarter of your fiscal year and wish to request an exception for the next fiscal year, or to make price changes early in the first quarter of the next fiscal year which require no exception, you may use your current fiscal year as your last fiscal year (LFY). However, you must have actual figures for at least 9 months of your current year. You may estimate figures for the remainder of the year. Attach to Form S-52 supporting documentation which shows the actual portion and the projected portion, and explains the methodology you employed to make the projections. If a price increase is to be implemented during the remaining portion of the fourth quarter, the current fiscal year is the price increase year and cannot be used as the last fiscal year.

Column (b).—Enter the revenues you would receive in the budgeted fiscal year in the absence of any price changes; i.e., revenues at last fiscal year prices and budgeted fiscal year volume and mix. Include the same amount of revenues from new services and new technology in this column, column (c), and item 31. Do not include research revenues in the entries. See instructions to Schedule A, paragraph 2, under "General Guidelines."

Column (c).—If you operate on a cash basis, read the instructions for item 9 before completing this column. Other-

wise, enter the proposed revenues for the budgeted fiscal year. Include revenues from new services and new technology, but exclude research revenues. If the proposed price increase will not be in effect for the entire fiscal year in which it is requested, the revenue entries in column (c) must reflect a composite of actual experience to the end of the most recently completed quarter, and a projection for the remaining portion of the fiscal year at the appropriate prices. Please consider carefully what effect the cost reimbursement contracts will have on the contractual allowances in the projection, since realized third-party reimbursements are considered prices under Economic Stabilization regulations.

Item 4.—Enter routine service revenues (daily rate charges for services). If you do not distinguish between routine and ancillary services, enter the inclusive rate revenues.

Item 5.—Enter all specialty service revenues other than those included in the daily rate routine revenues. Include all outpatient service revenues.

Item 6.—Enter professional fees for patient treatment billed, if not included in ancillary services in item 5 and if the related salaries, fees, or other compensation to doctors are included in expenses of the institution, regardless of whether you record such fees as revenues or as additions to special funds.

Item 7.—Self-explanatory.

Item 8.—Third-party cost reimbursement is included in the definition of "price." Accordingly, prices paid by an insurer under a hospitalization or other medical services plan are subject to the Economic Stabilization regulations. Please give careful attention to the determination of projected contractual allowances to third parties. Any deductions from revenues must be supported by attached documenta-

tion. If budgeted allowances and deductions deviate from historical patterns, the document should explain the deviations for the appropriate allowance or deduction category.

Item 9.—(Cash Basis Institutions): If you record revenue on a cash basis, with no recognition of full charges for services or allowances, enter the amount of the cash revenue in this item and leave blank items 4 through 8 in columns (a), (b), and (c).

Item 10.—Include all other operating revenues. If you are requesting an exception, use separate documentation to report nonoperating revenues.

Item 11.—If you are a government-related institution, enter the total amount of governmental appropriations. If the appropriation bears no direct relationship to services but is solely for the purposes of making up a cash deficit, do not include the amount of the appropriation in your aggregate annual revenues, but report it as nonoperating revenue in separate documentation. However, if you do not show in item 9 cash collections remitted to you as a governmental unit, AND the appropriation bears no relationship to services but is solely for the purposes of making up a cash deficit, then show in this item an amount equal to the cash collections and report the remainder of the appropriation as nonoperating revenue.

Item 12.—Self-explanatory.

Part III Census Data

Item 13.—If you are classified as an acute hospital, or any other hospital with outpatient facilities, enter in columns (b) and (d), respectively, the number of inpatient admissions and outpatient procedures in accordance with past practices. Outpatient procedures may be either visits or occasions of service, but must be consistent in both periods.

Enter patient day data (acute hospitals and long-term care facilities) in columns (f) and (g).

Enter in columns (c) and (e), respectively, inpatient costs and outpatient costs. If such costs are normally allocated on a relationship between inpatient and outpatient revenues, this allocation procedure is acceptable.

Item 14.—Use either the volume index or actual budgeted changes in costs attributable to volume to determine adjusted costs (Part IV, col. (c)). When you use actual budget data to identify changes attributable to volume, attach detailed documentation showing the bases upon which such changes were determined.

Acute Hospitals or Any Other Hospitals with Outpatient Facilities.—Use the volume index which includes a 2 percent adjustment for intensity, as reflected by the factor of 1.02. This volume index is calculated in three steps using data provided in item 13.

Step 1.—Compute a value for the index using only your last fiscal year actual patient days and the change in patient days with your last fiscal year outpatient procedures and the change in outpatient procedures. This computation is shown in the formula below.

Step 2.—Compute a value for the index, substituting your actual last fiscal year admissions and the change in admissions for your actual last fiscal year patient days and the change in patient days. This computation is shown in the formula below.

Step 3.—Compute the value of the index by taking the average (arithmetic mean) of the values computed in the first two steps (i.e., Step 1 and Step 2). The index value computed in Step 3 is the value to be entered in item 14.

Note that budget fiscal year inpatient and outpatient costs are not included in the volume index calculation.

Step 1:

$$\text{Volume Index} = 1.02 + \frac{\left(\frac{\text{LFY Inpatient Costs (item 13A, col. (c))}}{\text{LFY Actual Patient Days (item 13A, col. (g))}} \times \frac{\text{Change in Actual Patient Days (+ or -) (col. (g), item 13B minus item 13A)}}{\text{LFY Total Costs (item 13A, col. (c) + item 13A, col. (e))}} \right) + \left(\frac{\text{LFY Outpatient Costs (item 13A, col. (e))}}{\text{LFY Outpatient Procedures (item 13A, col. (d))}} \times \frac{\text{Change in Outpatient Procedures (+ or -) (col. (d), item 13B minus item 13A)}}{\text{LFY Total Costs (item 13A, col. (c) + item 13A, col. (e))}} \right)}{2}$$

Step 2:

$$\text{Volume Index} = 1.02 + \frac{\left(\frac{\text{LFY Inpatient Costs (item 13A, col. (c))}}{\text{LFY Inpatient Admissions (item 13A, col. (b))}} \times \frac{\text{Change in Inpatient Admissions (+ or -) (col. (b), item 13B minus item 13A)}}{\text{LFY Total Costs (item 13A, col. (c) + item 13A, col. (e))}} \right) + \left(\frac{\text{LFY Outpatient Costs (item 13A, col. (e))}}{\text{LFY Outpatient Procedures (item 13A, col. (d))}} \times \frac{\text{Change in Outpatient Procedures (+ or -) (col. (d), item 13B minus item 13A)}}{\text{LFY Total Costs (item 13A, col. (c) + item 13A, col. (e))}} \right)}{2}$$

Step 3:

$$\text{Volume Index} = \frac{\text{Step 1} + \text{Step 2}}{2}$$

Note: Changes in Actual Patient Days and Outpatient Procedures must indicate the direction of change as well as the actual amount of increase or decrease. The plus (increase) or minus (decrease) sign must be carried throughout the computation.

Volume Index for Other Institutions.—If you do not have outpatient facilities, do not use the volume index described above. If, by the use of normal budgeting procedures, you are unable to adjust your last fiscal year costs to reflect only changes in volume, calculate item 14 as follows:

$$\text{Volume Index} = \frac{\text{Projected Patient Days [item 13B, col. (g)]}}{\text{Last Fiscal Year Patient Days [item 13A, col. (g)]}}$$

Use the data provided in column (g) of item 13 to determine the ratio of patient days projected for the budgeted fiscal year to the patient days experienced in the last fiscal year. Enter this number in item 14.

Part IV Operating Costs

Cost Justification for Price Increase Year.—The fiscal periods for which cost justification data are presented must be the same as those periods for which revenues were reported in column (a) of item 13. In completing Part IV, you will separate cost changes resulting from increased prices which you must pay to render your services (i.e., changes in unit cost) from those cost changes resulting from changes in the volume of services rendered.

Column (a).—Include combined actual expenses incurred for all operations (excluding research) of your last fiscal year. Since both revenues and expenses for research activities are excluded, attach separate documentation containing full explanations for any research expenses not recovered from research revenues, when such expenses are part of a claim to serious hardship.

If you determined revenues for the last fiscal year by combining revenues realized for the first three quarters of the current fiscal year with a projection for the remaining quarter, you must also determine costs for this same period. Attach documentation to support these projections.

Adjustments Due to Budgeted Fiscal Year Reallocations.—When you change your last fiscal year method of producing and/or delivering a particular service, and the change results in a reallocation of costs among cost categories, you must adjust your last fiscal year costs by category to reflect the cost reallocations that will be effective in the budgeted fiscal year. The following example shows the required adjustments to the last fiscal year costs by category:

Hospital H in the last fiscal year operated its own laundry service. In the budgeted fiscal year, H is closing its laundry facility and has signed a contract with an outside laundry service. The cost of the budgeted fiscal year contracted laundry service will be included under column (b), item 24, "Other Expenses." Therefore, H must adjust the last fiscal year cost category entries by deducting all laundry related costs from the respective cost categories and entering the total of laundry costs under column (a), in item 24. From the wage/salary category (items 15, 16, and 17), H would deduct all last fiscal year laundry personnel wages or salaries and fringe benefits; from the utilities cost category (item 22), H would deduct all utility expenses allocated to laundry; and

so forth. There should be no change in total expenses for the last fiscal year; merely a reallocation of all laundry-related expenses from their original entries into item 24. Documentation must be attached to support all such cost reallocation adjustments and to reconcile differences in the financial statements.

Column (b).—Enter expenses for the budgeted or price increase fiscal year (excluding research). In item 30 only, enter expenses for new technology.

Column (c).—The data to be provided in this column represent the amount of costs which you would expect to incur if, in the last fiscal year, you were servicing the volume and mix of patients projected in the budgeted fiscal year (i.e., last fiscal year costs at projected volume). There are only two acceptable methods of making this computation; use either the volume index computed according to the formula provided in the instructions for item 14, or use actual budget data. You may not develop an alternative index factor. It is preferable to use the budget data method if you have the capability of deriving the information needed. The volume index method is provided for those institutions who cannot or choose not to make such computations. Each method will be described in general.

The volume index assumes that costs vary on a one-to-one relationship with volume. In recognition of the fact that all costs do not reflect volume changes, no volume adjustment is allowed for depreciation (item 25), interest (item 26) or insurance (item 27). Further, when an exception request is pending, the Cost of Living Council and/or IRS will take into consideration the degree to which costs respond to volume changes. If you show a decrease in volume, the extent to which costs cannot be expected to decrease proportionately will be a factor in determining serious hardship or gross inequity. Likewise, when you experience an increase in volume, it will be expected that your costs would not increase in direct proportion.

Volume Index Method.—At the top of column (a) in Part IV, enter the volume index as computed for item 14. For each applicable item (items 15(b) through 24), multiply the amount shown in column (a) for that item by the volume index, and enter the results of the computations in column (c). Do not adjust the entries for items 25, 26, and 27; instead, enter in column (c) the same amount shown in column (a).

Budget Method.—Explain every entry in a supporting document. No entry can be accepted without a full explanation of the methodology and computation. Do not adjust the entries for items 25, 26, and 27; instead, enter in column (c) the same amount shown in column (a).

For each cost item on Form S-52, multiply the actual unit cost of that item in the last fiscal year times the projected number of units serviced (or used) during the budgeted fiscal year. The "unit" chosen for each item must be statistically valid and in accordance with guidelines established by the American Hospital Association and the AICPA. While the statistical unit chosen may vary from institution to in-

stitution, any individual institution must be consistent in its use of the chosen units from year to year. The Cost of Living Council will decide in each case whether the particular unit chosen is acceptable. For any one item, you may develop in supporting documents several different units and their unit costs and enter in column (c) the total of their products.

To determine the unit cost of any item, divide the total costs for that item by the units of service for that fiscal year.

Acceptable Budget Methods.—You may prepare your Form S-52 by using a budget method, as explained in the instructions for Budget Method, column (c) of this part. In every case where the budget method used is not included in the suggested methods announced by the Cost of Living Council, either the Cost of Living Council or the Internal Revenue Service will decide whether the budget method is acceptable. File any unapproved budget method with the Cost of Living Council or the Internal Revenue Service before you file your exception request or price increase notification with the State Advisory Board or the Internal Revenue Service.

Exhibit I shows a suggested format for documentation which illustrates one of several budget methods which the Council has found acceptable. Also, an example follows:

Hospital H is developing supporting documentation to determine the entry for column (c) of item 15(b), "Wages/Other Salaries." H maintains its records on a functional (departmental) basis. To determine the wage and salary cost of each revenue-producing department, H customarily allocates the wage and salary costs of the nonrevenue-producing departments (such as administrative services) by the proportion which each revenue-producing department bears to the total revenues of the institution. H's operating room produces 10 percent of H's total revenues; therefore, H allocates 10 percent of the wage and salary expense of nonrevenue-producing departments to the operating room.

In its last fiscal year the operating room performed 8,000 procedures and had total wage and salary expenses (both direct and indirect) of \$80,000. In its budgeted fiscal year H expects to perform 10,000 procedures with total wage and salary expense of \$120,000. H would therefore show the following computations in its supporting documentation:

		Cumulative TOTAL
Operating Room		
Last fiscal year wage and salary expense	\$ 80,000	
Divided by —		
Last fiscal year surgical procedures	8,000	
Equals —		
Last fiscal year cost per procedure	\$ 10	
Multiplying by —		
Budgeted fiscal year surgical procedures	10,000	
Equals —		
Adjusted operating room wage and salary costs (budgeted fiscal year volume at last fiscal year cost)	\$100,000	\$100,000

H would continue with similar computations for its other revenue-producing departments, and enter the total of adjusted wage and salary costs in column (c) of item 15.

Column (d).—This column identifies cost changes. The entries for items 15(b) through 29 are the differences between the amounts in columns (b) and (c); i.e., the difference between the budgeted fiscal year costs and last fiscal year costs adjusted to reflect projected year volume. The entry for item 15(a) is the same as that amount in column (b).

Cost Justification Details — Supporting Schedules for Exception Requests.—When you want an exception for more than the 5.5 percent allowable cost increase limit for wages and salaries, furnish a Form S-16 and attach Form S-52 and Schedule A. Also attach additional documentation that fully identifies the nature of all increases for which an exception is requested. Include such information as:

1. Increases and reductions in the number of positions and the related expense effect;
2. Pay Board, Cost of Living Council and/or IRS approvals of wage exceptions requests;
3. Adjustments for low-wage earners;
4. Commitments involving pre-existing labor contracts or established pay practices; and
5. Tandem wage agreements which affect the exception request.

When you want an exception for more than the allowable cost increase limit for nonwage/salary expenses, furnish a Form S-16 and attach Form S-52 and Schedule A. Also attach additional documentation that explains the reasons for increases in costs as shown in items 18 through 27 of Form S-52, which serve as justification for the exception.

Item 15(a).—Low Wage Adjustments and Pre-existing, Binding Labor Contracts.

The Cost of Living Council has provided relief from the wage and salary controls of the Economic Stabilization Program for wage rate increases paid to low-wage workers to bring them to or toward \$3.50 an hour, effective on or after May 1, 1973 (\$2.75 an hour before May 1, 1973) and for binding (signed) labor contracts existing before November 8, 1971 that are still effective in the budgeted fiscal year. Excess cost increases due to low-wage adjustments and/or pre-existing labor contracts are eligible for pass-through treatment in calculating allowable costs to be used for justifying price increases. These excess cost increases are the entries for item 15(a), columns (b) and (d).

For low-wage adjustments, consider only low-wage increases up to \$3.50 (or \$2.75) an hour for the item 15(a) entry. If a wage rate increase causes an employee to earn more than \$3.50 (or \$2.75) an hour, include only the portion of the increase up to \$3.50 (or \$2.75) an hour. Do not include as wage increases the wage expense for low-wage workers hired into new positions in the budgeted fiscal year. However, if a wage increase is granted to such employees after the date of hiring, you may include the expense of the increase only.

Compute the low-wage excess as follows: Calculate the total wage expense for low-wage workers in the last fiscal year. Multiply that amount by 5.5 percent (i.e., 0.055). If the total

adjustment to be paid low-wage workers in the budgeted fiscal year is less than or equal to 5.5 percent of the low wage expense in the last fiscal year, there is no low-wage excess eligible for pass-through. If the adjustment is more than 5.5 percent of the low-wage expense for the last fiscal year, the amount of the excess is eligible for pass-through; add this excess to any excess of costs resulting from pre-existing wage contracts, and enter the total in item 15(a). For example, suppose a hospital grants a 5.5 percent wage increase to its non-low-wage employees and 20 percent to low-wage employees. The 20 percent increase to low-wage employees did not cause any of the wage rates to exceed \$3.50 (or \$2.75) an hour. In the budgeted fiscal year, total adjustments to low-wage workers amounted to \$10,000 (20 percent of the low-wage base of \$50,000). Of that amount, \$2,750 represented the standard 5.5 percent increase and \$7,250 represented the excess over 5.5 percent. Therefore, the hospital would enter "\$7,250" in columns (b) and (d) of item 15(a). The same amount would be deducted from the column (b) entry for item 15(b). The \$7,250 is eligible for treatment as a pass-through if all other requirements are met.

Make a similar computation of cost excesses to determine the eligibility of costs associated with binding, pre-existing labor contracts. Only those pre-existing labor contract costs that exceed 5.5 percent of the total costs for the last fiscal year and are associated with those respective pre-existing labor contracts are to be included in item 15(a) as eligible for pass-through.

The entry in columns (b) and (d) of item 15(a) is the sum of the low-wage cost excesses and the pre-existing labor contract cost excesses. Attach detailed documentation to support this entry so it can be considered for pass-through treatment.

Item 15(b).—Other Wages/Salaries.

In item 15(b), column (a), include all wage/salary costs incurred in the last fiscal year. Item 15(b), column (b) is the total of the budgeted fiscal year wage and salary costs less any amount reported in item 15(a), column (b).

Items 16-18.—Self-explanatory.

Item 19.—Include amounts paid to institution-based physicians who function as independent contractors and who are not considered employees of the institution. (Amounts paid to salaried physicians should be included in item 15.)

Items 20-22.—Self-explanatory.

Item 23.—Group all expenses (other than salaries and fringe benefits) charged to special purpose funds if the expenses cannot be allocated to an appropriate expense category. Attach additional documentation.

Item 24.—Attach additional documentation for all components of this cost category.

Item 25.—You may not claim depreciation on a rental facility in your capacity as a tenant. If you are renting your facility, add an extra line in this item to show your annual rental expense

on the facility only. Do not adjust for volume. Enter in column (c) the same amount shown in column (a).

Items 26 and 27.—Do not adjust for volume. Enter in column (c) the same amount shown in column (a).

Items 28 and 29.—Self-explanatory.

Item 30.—New technology means new (different) equipment and services as contrasted to enlargement or modernization of existing facilities. Thus, a new cardiac care unit which an institution did not previously have is considered new technology. However, a new patient care wing which only adds more patient beds of the same kind that previously existed is not considered new technology. Form S-52 (items 30-32) provide space for a cost summary of all items of new technology. If you have more than one category of service or equipment qualifying as new technology, show the aggregate in items 30 and 31 and attach documentation to explain each category by information requested in these items. Also show in your documentation the aggregate of items combined as the total for item 32.

Item 31.—Do not include any price increase revenues in this item.

Item 32.—Enter the amount in this item in item 43. If the amount is negative, enter a zero in item 32 and in items 43, 44, and 45.

Item 33.—Self-explanatory.

Part V Price Increase Subject to Exception

Use this part to calculate allowable costs for price increase justification and to determine the amount of exception you want. If your budgeted fiscal year begins before January 1, 1973, complete this part in its entirety, because you are subject to the "new technology" cost limitation for the remainder of that fiscal year. For a budgeted fiscal year that begins on or after January 1, 1973, do not complete the "New Technology Cost Increases" section (items 42 through 45); for this category, specific instructions are provided in items 38 and 39 to show a combination of the former nonwage (2.5 percent) and new technology (1.7 percent) cost category limitations.

Items 34-45.—Self-explanatory. Instructions for the related columns follow.

Column (a).—Limitations: Entries in this column (for items 34, 38, and 42) represent the limitations, by regulations, on allowable cost increases to be used for price increase justification. The limitations for each listed cost category do not represent automatic allowances unless such cost increases will actually be incurred.

Column (b).—Actual: Post the entries in this column (for items 35, 39, and 43), from Part IV, column (d). These are the actual cost changes within respective cost categories, adjusted for volume. If any of the actual changes are negative, enter the changes as negative amounts in this column, except when new technology expenses are negative (i.e., revenues exceed expenses for new technology), then enter a zero.

Column (c).—Allowable: Entries in this column (for items 36, 40, and 44) are

the lesser of the entries in either column (a) or column (b). These entries represent cost increases allowable per cost category for price increase justification. NOTE: If the lesser amount is negative, enter a zero in column (c).

Column (d).—Excess: Entries in this column (for items 37, 41, and 45) show the differences between the actual cost changes (in column (b)) and the allowable amounts (in column (c)). If the entry in column (c) for any cost category is a zero, then enter in column (d) the negative amount, if any, which appears in column (b) for that cost category.

Items 46 and 47.—Self-explanatory.

Item 48.—Self-explanatory. However, the following example shows how you can calculate the entry.

If:

- (a) the entry in item 15(a), column (d) is \$10,000, and
- (b) the entry in item 37, column (d) is \$8,000,
then \$8,000 of the total of \$10,000 in low-wage adjustments may be used as allowable cost increases, subject to the overall 6 percent limitation (the item 54 test) and the base period profit or net revenue margin limitation (the item 68 test).

Item 49.—Pensions and group insurance cost increases, etc., (item 18(a), column (d)) are eligible for "spillover" treatment. The amount of pensions and group insurance eligible for spillover is the amount of increase in such costs in excess of the appropriate dollar limitation for the nonwage/salary cost category as shown in the entry for item 38. However, the amount of spillover cannot cause the total of allowable cost increases in the nonwage/salary category to exceed actual cost increases in that category. For example, if:

- (a) the entry in item 18(a), column (d) is \$10,000, and
- (b) the entry in item 38, column (a) is \$8,000, and
- (c) the entry in item 41, column (d) is \$1,000,
then \$1,000 of the \$2,000 excess (excess of pensions, etc., in item 18(a), column (d) over the nonwage/salary limitation in item 38, column (a)) for this cost category may be used as allowable cost increases, subject to the overall 6 percent limitation and the base period profit or net revenue margin limitation (the item 68 test).

Item 50.—Self-explanatory.

Item 51.—When the actual cost increases in the nonwage cost category exceed the category limitation, and such cost increases are due to FICA and/or unemployment insurance, only that part of the nonwage cost increases due to FICA and unemployment insurance may be passed through above the category limitation. The

maximum amount eligible for this provision is that amount shown as the entry in item 18(b), column (d). For example, if:

- (a) the entry in item 38, column (a) is \$10,000, and
- (b) the entry in item 39, column (b) is \$12,000, and
- (c) the entry in item 18(b), column (d) is \$3,000, and
- (d) the entry in item 50 = \$1,000,
then \$1,000 of the total \$3,000 in FICA and unemployment insurance increases may be used as additional allowable cost, subject to the overall 6 percent limitation and the base period profit or net revenue margin limitation (the item 68 test).

Items 52-56.—Self-explanatory.

Items 57 and 58.—Use Schedule A to make these computations and submit this schedule with Form S-52. Do not include new technology/services revenues (item 31) as price increase revenues.

Item 59.—Self-explanatory.

Item 60.—If the price increase revenues in item 59 would not cause you to exceed your base period net revenue (profit) margin limitation, then item 60(a) is equal to item 59 less item 54.

If the amount of the allowable costs in item 54 is greater than or equal to the price increase revenues in item 59, then enter that part of the price increase revenues which causes the base period net revenue (profit) margin to be exceeded.

If the amount of price increase revenues shown in item 59 would cause you to exceed both your allowable cost limitation (item 54) and the base period net revenue (profit) margin limitation (item 67(a) or (b)), then the amount subject to exception is equal to item 59 less item 54, plus any additional amount of realized revenues by which the base period limitation is exceeded.

Part VI Base Period Margin Limitation

The definition given for "Base Period" in the Phase III regulations differs from that given in the Phase II regulations. The Phase II definition continues to apply for any fiscal year completed before January 11, 1973, and the Phase III definition applies for all succeeding fiscal years.

Budgeted Fiscal Years Completed Before January 11, 1973.—"Base Period" means any two, at the option of the institution concerned, of that institution's last three fiscal years ending before August 15, 1971. A fiscal year of less than 12-months duration may not be used as a base period year.

Budgeted Fiscal Years Completed on or After January 11, 1973.—"Base Period"

means any two, at the option of the institution concerned, of the following fiscal years: that institution's last three fiscal years ending before August 15, 1971, and any fiscal years completed on or after that date. The budgeted fiscal year may not be used as a base period year. A fiscal year of less than 12-months duration may not be used as a base period year.

A new institution does not have a base period profit margin or net revenue margin limitation until such time as two full fiscal years have been completed. A full fiscal year consists of 12 months.

Show in columns (a) and (b) the base period years you select and enter the requested information in columns (a) and (b) of items 61, 62, and 63.

Item 61.—If prices were increased illegally in any selected base year, the amount of illegal price increase revenues realized in that year must be deducted from aggregate annual revenues for that year. Revenues reported in item 61 must conform to the aggregate annual revenues definition (6 CFR 300.18(a)).

Item 64.—Self-explanatory.

Items 65-67.—The base period net revenues or profit margin may be either positive or negative, depending on the results of operations in the selected base years.

Item 68.—If the result of all price increases, both implemented and proposed, for the budgeted fiscal year would cause you to exceed your base period profit or net revenue margin, you should enter the amount of the requested margin. Attach separate documentation when you file Form S-52, and explain why an exception to this limitation should be granted.

Part VII Productivity Data

Prepare this part if you are requesting an exception. Otherwise, skip to Part VIII.

Column (a).—For total man-hours, assume a standard work week for full time or full time equivalent employees.

Column (b).—Divide the entry in column (a) by the number of appropriate actual patient days shown in item 13(g) to determine man-hours for each patient day.

Part VIII Compliance, Quarterly Reporting, and Self-Monitoring

Do not complete this part if you are requesting an exception. In all other cases, complete Part VIII and attach Schedule A. All entries are self-explanatory.

Part IX Books and Records and

Part X Certification and Signature are self-explanatory.

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(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)
Category	Statistical Unit	Number Units	Last Fiscal Year TOTAL COST	Unit Cost ((d) ÷ (c))	Number Units	Budgeted Fiscal Year TOTAL COST	Unit Cost ((g) ÷ (f))	Adjusted Total Cost ((e) X (f))
Commissions: (item 19) Anesthesiology Emergency Room Pathology X-ray	Procedures Proc. or Visits Procedures Procedures		\$	\$		\$	\$	\$
TOTAL COMMISSIONS	XXXXXX	XXXX		XXX	XXX		XXX	
Food: (item 21) Drugs: (item 20)	Meals Served Prescriptions Issued							

EXHIBIT I (Back)
Sample Format for Documentation

Computation of "Adjusted Costs" for Indicated Cost Categories, by Revenue Department

Form S-52 Cost Category:
(check one)

☐ Wages and salaries (item 15)
☐ Fringe benefits (item 16)
☐ Pensions, etc. (item 18(a))
☐ FICA and unemployment taxes (item 18(b))

☐ Utilities (item 22)
☐ Special purpose (item 23)
☐ Other expenses (item 24)

(a)	(b)	(c)	(d) Last Fiscal Year		(e)	(f)	(g) Budgeted Fiscal Year		(h)	(i)
Revenue Department	Statistical Unit	Number of Units	Total Cost (Direct & Indirect)		Unit Cost ((d)-(e))	Number of Units	Total Cost (Direct & Indirect)		Unit Cost ((g)-(f))	Adjusted Cost ((e) X (i))
INPATIENT										
Surgery	Patient Days (PD)		\$		\$		\$		\$	\$
Intensive Care	PD									
Cardiac	PD									
Maternity Ward	PD									
Delivery Room	Deliveries									
Nursery	Newborn Days									
Pediatrics	PD									
General Medicine	PD									
OUTPATIENT & ANCILLARY										
Radiology	Procedures									
Pathology	Procedures									
EKG	Procedures									
Emergency Room	Proc. or Visits									
Pharmacy	Prescriptions									
Operating Room	Procedures									
Clinic	Proc. or Visits									
TOTAL ADJUSTED COSTS FOR THIS COST CATEGORY										
(Enter here and on Form S-52 in column (c) of the corresponding category.)										
.....\$										

[From the Department of the Treasury—Internal Revenue Service, Economic Stabilization Program, Issued July 1973]

INSTRUCTIONS FOR PREPARING SCHEDULE A (TO IRS FORM S-52)

REPORT OF PRICE CHANGES FOR INSTITUTIONAL PROVIDERS OF HEALTH SERVICES

Purpose.—Use this schedule with Form S-52 (Revised July 1973) to show the effective dates of your price changes and their effect on revenues in a given fiscal year. This schedule represents the only approved method of computing the increase (annualized and realized) in revenues due to price changes for budgeted fiscal years beginning on or after July 1, 1973. The information furnished in Form S-52 (Revised July 1973) and its Schedule A is used to determine compliance with the Economic Stabilization regulations.

Schedule A is optional when Form S-52 (Revised September 1972) is used. The Form S-52 (Revised September 1972) can be used to determine compliance with the Economic Stabilization regulations for current and past fiscal years, if the form is completed in a manner consistent with past practice using actual instead of budgeted data.

Definitions

(1) The budgeted fiscal year (abbreviated on Form S-52 and Schedule A as BFY) refers to the year under determination; it is the price increase year for which an exception is requested, a report is filed, or a compliance determination is made. If an institution is completing a year-end annual report, the budgeted fiscal year (or BFY) on Form S-52 and Schedule A refers to the year just completed for which the annual report is being made.

(2) The last fiscal year (abbreviated as LFY) is the fiscal year immediately preceding the budgeted fiscal year.

(3) Fiscal year is abbreviated as FY.

(4) Aggregate annual revenues (as defined in 6 CFR 300.18(a)) is abbreviated as AAR.

Who Must File a Report of Price Increases.—Pursuant to section 300.18 of Title 6 of the Code of Federal Regulations (6 CFR 300.18), if the price increases you are proposing will not cause you to exceed your base period profit or net revenue margin; AND the amount shown in Schedule A, line 6, column (i) is less than or equal to your allowable cost justification (calculated pursuant to 6 CFR 300.18(d)); AND

(1) The amount shown in Schedule A, line 6, column (i) is $2\frac{1}{2}$ percent, or less, of the aggregate annual revenues (AAR) realized in the last complete fiscal year (LFY), then the price increase may be implemented without a report. However, you are required to maintain adequate records to support your computations for an audit by the Internal Revenue Service.

(2) The amount shown in Schedule A, line 6, column (i) is more than $2\frac{1}{2}$ percent but not more than 6 percent of the aggregate annual revenues realized in the last fiscal year, then a report of price increases must be filed with your District Director of the Internal Revenue Service, and with the Medicare Intermediary, before you implement the increase.

All other price increases require that an exception be granted before they are implemented. While you wait for a decision on the requested exception, you may implement only that part of the requested price increase to which you are entitled under the Economic Stabilization regulations.

The fact that the allowable cost limitations of 6 CFR 300.18(d) have been exceeded does not require an exception unless such overages are used to cost justify an annualized increase in aggregate annual revenues due to price.

What to File When Reporting a Price Increase.—Use Schedule A to report your price increases, and Form S-52 to report your cost justification for those price increases. If you use the July 1973 revision of Form S-52, show justified allowable cost increases in item 54 of that version. If you use the September 1972 version of Form S-52, compute cost increases in Part III of that version but compute allowable costs using the format of Part V of the July 1973 form. An Addendum for Form S-52 (Rev. Sept. 72) is available from your local Internal Revenue Service office, and it contains the format of Part V of the July 1973 form. Note that line item numbers on the July 1973 form do not correspond to the same items on the September 1972 form.

Who Must File Quarterly and Annual Reports.—You must file quarterly and annual (i.e., fourth quarter) reports on an entity basis if you:

(1) Have received from the Cost of Living Council, the Price Commission, or the Internal Revenue Service, a Decision and Order or a Remedial Order requiring such reports; OR

(2) Have received an exception granted by the Cost of Living Council, the Price Commission, and/or the Internal Revenue Service AND have aggregate annual revenues (as defined in 6 CFR 300.18) of more than one million dollars in either the last fiscal year or the budgeted fiscal year.

Quarters to Be Reported.—Unless otherwise specified in an Order requiring such reports, you must file reports for each of your fiscal quarters remaining in the budgeted fiscal year at the time the Order was issued. For example, if an Order is issued during the third fiscal quarter of your budgeted fiscal year, you would file reports for the third and fourth quarters; if an Order is issued prior to the start of the budgeted fiscal year, you would report all four quarters. Regardless of the date of any Order, file an annual report for the budgeted fiscal year.

File a separate report of net revenue or profit margin performance only after completion of the year immediately following the year for which quarterly reports were filed.

When to File Quarterly and Annual Reports.—File a quarterly report for the first, second, or third quarter of your fiscal year within 45 days of the end of the respective quarter. File a quarterly report for the fourth fiscal quarter (i.e., the annual report) of your fiscal year within 90 days of the end of that fiscal year to allow time for completion of the annual audit.

What to File for Quarterly and Annual Reports.—Use Form S-52 and attach Schedule A to file the annual report for your budgeted fiscal year (i.e., the price increase fiscal year), and reports for any quarter falling within the budgeted fiscal year. Annual reports must be accompanied by year-end financial statements for that fiscal year. If you have your financial statements audited by independent public accountants, attach a copy of these statements and a copy of the accountants' opinion. If you have unaudited statements, submit copies of these statements.

Where to File.—File all reports with the District Director of the Internal Revenue Service for the district in which your institution is located, regardless of whether an exception was granted or other Order issued by the Cost of Living Council, the Price Commission, or the Internal Revenue Service, unless you were otherwise directed in the Order requiring such reports.

General Guidelines

(1) It is the annualized offset of price increases which must be cost justified on Form S-52. Therefore, in projecting the number of units of service, you must use the total number of units which will be serviced during the full budgeted fiscal year, even if the price increase will not be in effect for the full fiscal year. That is, you must make your projections, of price increases revenue as if all prices were increased on the first day of the fiscal year and those prices were charged uniformly throughout the fiscal year.

(2) Price increases are normally measured from the prices in effect on the last day of the last fiscal year. However, this method assumes that the prices on the last day did not differ from prices authorized under the Economic Stabilization regulations for that fiscal year. If the authorized prices had been temporarily lowered under a written agreement with the IRS District Director to effect a refund of overcharges, you must adjust those prices upward to the authorized level for that fiscal year. And adjusted price may not exceed the highest price actually charged for that service during that year. If prices on the last day were higher than the maximum prices authorized under Economic Stabilization regulations, then you must decrease those prices to the legally authorized pricing level. See the instructions below for compelling column (d).

(3) You must use only the realized effect on revenues of price reduction to offset the annualized effect on revenues of price increases. In any case where a price reduction is used to offset a price increase, any subsequent upward revision of that reduced price will produce price increase revenues in the year which such an upward revision is made, regardless of the base price. In any case where a price reduction was not used as an offset to a price increase, only that part of subsequent adjustments occurring above the base price will produce price increase revenues.

(4) Any increase in the per diem or per occasion of service rate paid by third-party cost reimbursers is considered an increase in price, except as provided below in the instructions for Part II, column (d).

(5) Establishment of the base price, such as that permitted by Price Commission Ruling 1972-267, does not produce price increase revenues within the meaning of 6 CFR 300.18.

(6) Revenues that are the result of price increases instituted before August 15, 1971, are not price increase revenues within the meaning of 6 CFR 300.18.

(7) The carry-over effect of legal price increases instituted in a prior fiscal year is considered to produce price increase revenues only if the maintenance of those prior price increases would cause you to exceed your base period profit or net revenue margin in the current year.

(8) Revenues that are the result of the introduction of new services (including new technology) are not price increase revenues as long as there is no upward revision of the price for that service during the year the new services are introduced. Per diem rates paid by third-party cost-reimburers should be adjusted accordingly, and documentation attached to support this adjustment.

(9) A new institution does not have a base period net revenue or profit margin limitation until it has completed its first two full fiscal years of operation. A full fiscal year consists of 12 months.

Sanctions for Failure to File.—Failure to report timely and in the prescribed manner will subject you to the appropriate sanctions as provided in 6 CFR 300.53.

Submit requests for an extension of time to the District Director of the Internal Revenue Service for the district in which the provider entity is located.

SPECIFIC INSTRUCTIONS

No specific instructions will be given for items considered self-explanatory. Enter all identification data requested before you complete the remainder of Schedule A.

PART I. PAYERS OTHER THAN COST-REIMBURSERS

Report in this part all price changes affecting any payer other than third-party payers who pay under a cost-reimbursement contract. You should use this part to report any third-party payer that does not pay charges; but list these separately in Part I, and show the respective prices paid under such contract. (Report cost reimbursement contracts in Part II.) For example, if the contract price is a negotiated rate, then the negotiated rate is the price.

Column (a).—List each commodity or service for which the price has changed (either increased or decreased), or will be changed, during the budgeted fiscal year.

Column (b).—Show the billing unit for each price. For example, the unit for emergency room might be "visits"; for room and board, it would be "day"; etc.

Column (c).—Report the price to be charged during the budgeted fiscal year.

Column (d).—For each service, show the price in effect on the last day of the last fiscal year. If, however, the price on the last day was illegal or if it had been temporarily lowered to effect a refund of overcharges to assure compliance by the end of that year then such price must be adjusted to the legally authorized level. When such adjustments are made, attach documentation to show how the authorized pricing level for the last fiscal year was established. Please use the following guidelines:

(1) If you did not exceed the base period net revenue or profit margin in the last fiscal year: The entries for column (d) will be that set of prices which, had they been charged uniformly throughout the last fiscal year, would have produced price increase revenues less than or equal to the sum of your allowable costs for that same fiscal year and the amount of any exception granted for that year.

(2) If you exceeded the base period net revenue or profit margin in the last fiscal year: The entries for column (d) will be that set of prices which, had they been charged uniformly throughout the last fiscal year, would have produced price increase revenues less than or equal to the sum of your allowable costs for the same fiscal year and the amount of any exception granted for that year MINUS the dollar amount by which you exceeded your base period net revenue or profit margin in your last fiscal year.

Allowable costs (excluding any exception granted) must be calculated pursuant to 6 CFR 300.18(d) and may not exceed 6 percent of the aggregate annual revenues realized in the immediately preceding fiscal year. (See "What to File When Reporting a Price Increase," above, for a discussion of allowable costs.) In determining the appropriate set of your last fiscal year's prices, consider only the

prices for those services for which price changes were actually made the last fiscal year. The upper limit for any individual price is the highest price actually charged during that year.

Column (e).—Subtract the last fiscal year price (col. (d)) from the budgeted fiscal year price (col. (e)). Enter totals for each service or commodity.

Column (f).—If the first fiscal quarter of the budgeted fiscal year has not yet been completed, enter a zero. If any quarter of the budgeted fiscal year has been completed, enter the total number of units of service rendered from the first day of the budgeted fiscal year through the last day of the last completed quarter, even if the price increase was not implemented on the first day. If the budgeted fiscal year has been completed, enter the total number of units rendered during the entire budgeted fiscal year. Do not include any units rendered to patients covered by a third-party insurer that pays under a cost reimbursement contract; these units will be reported under Part II.

Column (g).—If the budgeted fiscal year has been completed, enter a zero. If the budgeted fiscal year has not begun or if the first fiscal quarter has not yet been completed, enter the total number of projected units of service for the full budgeted fiscal year, regardless of when in the budgeted fiscal year the price is to be changed. If any fiscal quarter of the budgeted fiscal year has not been completed, enter the projected number of units for the fiscal quarters of the budgeted fiscal year not yet completed.

Column (h).—Add the numbers in columns (f) and (g) on each line, and enter totals for each.

Column (i).—Multiply the number of units in column (h) by the price increase in column (e) on each line, and enter the products for each.

Column (j).—If the price change has already been made, enter the number of units of service rendered from the effective date of the price change through the end of the quarter being reported. If the price change will not be made until later in the budgeted fiscal year, enter a zero. If the price change was made on the first day of the budgeted fiscal year, this number will be the same as that shown in column (f).

Column (k).—If the price change is already in effect and will remain in effect throughout the remainder of the budgeted fiscal year, enter the same number of units as shown in column (g). If the change is to be made on a future date, enter the projected number of units to be serviced from the effective date through the last day of the budgeted fiscal year.

Column (l).—Add column (j) and column (k) on each line, and enter totals for each.

Column (m).—Multiply column (l) by column (e) on each line, and enter the products for each.

Column (n).—Enter effective date of the price change.

Line 1.—Column (i).—Enter the total of all entries in this column.

Column (m).—Enter the total of all entries in this column.

Line (2).—In the line space provided, enter the percentage deduction from revenues for bad debts and charity allowances. If the budgeted fiscal year has not been completed, use projections for that part of the year for which actual data is not available. To compute the dollar amount of bad debt and charity allowances, multiply the totals for line 1, columns (i) and (m), respectively, by the percentage figure in line 2, and enter the dollar results in columns (i) and (m), respectively.

Line 3.—Subtract line 2 from line 1 in columns (i) and (m), respectively, and enter remainders.

PART II. PRICE CHANGES UNDER COST-REIMBURSEMENT CONTRACTS

The definition of the term "price" includes a price reimbursed to a provider under a cost-reimbursement contract. In this part, list each price which is to be changed under such a contract and specify the third-party insurer (Medicare, Medicaid, etc.).

Under the Economic Stabilization regulations, institutions are required to report all price increases above (1) base prices as defined by the regulations, or (2) prices in effect on the last of the last fiscal year, whichever is higher, when such increases result in an annualized increase in aggregate annual revenues due to price in excess of 2½ percent of aggregate annual revenues in the last fiscal year (see instructions for column (d) below for certain possible adjustments). For purposes of the Economic Stabilization Program, each of the following

changes or claims for changes in the reimbursement rate constitute a price change to third-party cost-reimburers:

- (1) Change in interim price.
- (2) Change in price claimed on cost reports submitted to the cost-reimbursers.
- (3) Change in price established by the cost-reimbursers following its initial review.
- (4) Change in price established under each review after the initial review until the final price is established.

If any of the price changes cause you to come under the reporting or notification requirements, you must report the price changes as they become effective. A price increase occurs when either (1) the price for the last fiscal year is reduced in accordance with one of the above criteria and the price decrease is not fully offset by a price decrease in the budgeted fiscal year, or (2) the price in the budgeted fiscal year increases in accordance with one of the above criteria.

The total annualized price increase revenues authorized (including any exception granted), less the amount shown in Part 1, line 3, column (i), represents the maximum amount of annualized price increase revenues which you may seek from third-party cost-reimburers for a fiscal year. See the instructions for column (d), below, for certain possible adjustments.

Column (a).—Group all price changes by the third-party payer; i.e., list all Medicare prices together, all Medicaid prices together, etc.

Column (b).—Show the billing unit for each price.

Column (c).—Show the price to be charged in the budgeted fiscal year. See the discussion above for various prices which may need to be reported.

Column (d).—Show the most decent price (as discussed above) effective for the last fiscal year. This price may not be higher than the legally authorized price for the last fiscal year (as discussed in the instructions for column (d) of Part I).

When a third-party payer expresses cost reimbursement as a rate per patient day (or adjusted patient day) or per outpatient visit, the price for the last fiscal year may be increased by 2 percent to show the delivery of more services per patient day or outpatient visit. This combination of the last fiscal year price and the 2 percent intensity factor will be termed the "adjusted last fiscal year price" and is the point from which the price increase will be measured. When this factor is applicable, show by an asterisk (*) that the last fiscal year price has been adjusted for the entry in column (d). You may not adjust the last fiscal year price if the third-party payer reimburses in any other manner. You may not use an intensity factor greater than 2 percent.

The following example illustrates use of the 2 percent intensity factor. You would enter in column (d) the amounts shown under "Adjusted Last Fiscal Year Price," below, and in column (e) the amounts shown under "Unit Price Increase," below.

EXAMPLE

Payer	Unit	BFY price	LFY price	1.02 (if applicable)	Adjusted LFY price	Unit Price increase
Medicare:						
Inpatient.....	PD.....	\$80.12	\$75.00	1.02	\$76.50	\$3.62
Outpatient.....	Visits.....	9.90	8.20	1.02	8.36	1.54
Blue Cross:						
Inpatient.....	PD.....	102.95	89.50	1.02	91.30	11.65
Outpatient:						
EKG.....	Procedures.....	25.00	23.00	NA	23.00	2.00
X-ray.....	Procedures.....	10.00	9.20	NA	9.20	.80
Other.....	Visits.....	12.62	10.59	1.02	10.80	1.82

Discussion.—In the foregoing example, Medicare reimbursement is calculated on a patient day or patient visit basis. Therefore, the 1.02 adjustment for intensity applies to all prices paid by Medicare.

Blue Cross pays on a mixed system. All inpatient prices and most outpatient prices are expressed as a rate per patient day or per visit. Certain outpatient departments are, however, reimbursed by the number of procedures performed for persons covered by the insurer. In the example, reimbursement for EKG and X-ray is not subject to the 1.02 intensity adjustment since higher intensity will be reflected as a greater number of procedures.

Column (e).—Subtract the last fiscal year price (col. (d)) from the budgeted fiscal year price (col. (e)). Enter the remainder for each service or commodity.

Columns (f)-(m).—Most cost reimbursers pay a uniform rate throughout the fiscal year. In such a case, the following pairs of columns should be identical: (f) and (j); (g) and (k); (h) and (l); (i) and (m). If they are not, attach an explanation.

Column (n).—If the effective date of price increases to third-party payers under cost-reimbursement contracts is not the first day of your fiscal year, attach an explanation.

Line 4.—Column (i).—Enter the total of all entries in this column.

Column (m).—Enter the total of all entries in this column.

Line 5.—Enter the amounts shown in line 3, columns (i) and (m), respectively, from Part I

Line 6.—Add lines 4 and 5 in columns (i) and (m), respectively. Line 6, column (i) represents the annualized effect on revenues of all price increases. This is the amount which must be cost-justified, and it must meet the 6 percent limitation. Line 6, column (m) is the actual amount of revenue from price changes that occur in the budgeted fiscal year which you have realized (if your budgeted fiscal year has been completed) or expect to realize (if your budgeted fiscal year has not yet begun or is in progress).

Use of Schedule A with Form S-52.—After you complete Schedule A, use the information derived to complete your report of price increases, your quarterly report, your annual report, and/or your self-monitoring check. Details on the specific uses of this information are in the general instructions for this schedule and in the instructions for the Form S-52 (Rev. July 1973). Additionally, a few specific points of interest follow:

If You Use the September 1972 Revision of Form S-52.—Calculate the entry for item 18(b) as follows: Divide the amount shown in Schedule A, line 6, column (i) by the amount shown in Form S-52, item 14, column (a). This is the annualized percentage increase in aggregate annual revenues due to price increases.

If You Use the July 1973 Revision of Form S-52—

(1) The amount shown in Schedule A, line 6, column (i) should be equal to the amount shown in Form S-52, item 59, when you request an exception or when an exception has already been granted for the budgeted fiscal year.

(2) When you complete Part VIII of Form S-52, show the same amount in item 75 as you show in Schedule A, line 6, column (i). Also, show in Form S-52, item 77, the same amount that you show in Schedule A, line 6, column (m).

For All Revisions of Form S-52—

(1) The amount shown in Schedule A, line 6, column (i), is the amount which must not exceed your justified allowable costs, or 6 percent of the aggregate annual revenues realized in the last fiscal year whichever is less, except when you have been granted an exception. If you have been granted an exception for the budgeted fiscal year, then the amount of annualized price increase revenues (Schedule A, line 6, column (i)) must not exceed the sum of the exception granted and the lesser of justified allowable costs, or 6 percent of the aggregate annual revenues realized in the last fiscal year.

(2) The amount shown in Schedule A, line 6, column (m), is the amount of price increase revenue which you will actually realize. This amount can never be greater than the amount shown in Schedule A, line 6, column (i).

ADDENDUM TO FORM S-52 (REV. SEPT. 72), HOSPITALS AND OTHER INSTITUTIONAL HEALTH SERVICES PROVIDERS SUPPLEMENTAL WORKSHEET (FOR IRS FORM S-16)

When you prepare Form S-52 (revised September 1972), you do not need to complete Part IV. However, the Cost of Living Council and the Internal Revenue Service require you to show how you have computed your price increase subject to exception. The form in this addendum is for that purpose. This form is similar to Part V of Form S-52 (revised July 1973). Instructions for completing it follow below.

When you file your Form 52 (revised September 1972) please attach the filled-in addendum and any other required documentation. We appreciate your cooperation.

File your exception request with your local District Director of Internal Revenue Service. The District Director will forward the request to the State Advisory Board (SAB). The SAB recommendation will not be required if the board fails to make its recommendation pursuant to 6 CFR 300.18(c) (2) within 30 days after receipt from IRS.

INSTRUCTIONS FOR PREPARING ADDENDUM TO FORM S-52

PART IX. PRICE INCREASE SUBJECT TO EXCEPTION

Use this part to calculate allowable costs for price increase justification, and to determine the amount of exception you want. If your budgeted fiscal year begins before January 1, 1973, complete this part in its entirety, because you are subject to the "new technology" cost limitation for the remainder of that fiscal year. For a budgeted fiscal year that begins on or after January 1, 1973, do not complete the "Net New Technology Cost Increase" section (items 70 through 73); for this category, the instructions in item 66 on the form in the addendum show a combination of the former nonwage (2.5 percent) and new technology (1.7 percent) cost category limitations. Specific instructions for completing the columns and items on the form in the addendum follow:

Items 62-73: Largely self-explanatory. Detailed instructions for items 63, 67, and 71 follow the instructions for column (b).

Column (a).—Limitation: Entries in this column (of items 62, 66, and 70) represent the limitations, by regulations, on allowable cost increases to be used for price increase justification. The limitation for each listed cost category does not represent automatic allowances unless such cost increases will actually be incurred.

Column (b).—Actual: Take the amounts you show for Part III, column (d) of items 21, 32, and 35 and post them in this column (for items 63, 67, and 71). Specific instructions for each item follow.

Item 63.—This entry may be either positive or negative.

Item 67.—For fiscal years beginning before January 1, 1973, this entry may be either positive or negative.

For fiscal years beginning on or after January 1, 1973, this entry is a combination of the new technology category and the nonwage category. If the amount you show in item 35 is positive (i.e., expenses exceed revenues for new technology), then add items 35 and 32, column (d), and enter the sum in item 67. If the amount you show in item 35 is zero or negative (i.e., revenues exceed expenses for new technology), enter only the amount shown in item 32, column (d). This entry may be either positive or negative.

Item 71.—Enter any negative amount as a zero.

Column (c).—Allowable: Use the lesser of the entries in column (a) or column (b) as the entries in this column (for items 64, 68, and 72). These entries represent cost increases allowable per cost category for price increase justification. NOTE: If the lesser amount is negative, enter a zero in column (c).

Column (d).—Excess: Figure the differences between the actual cost changes (in column (b)) and the allowable amounts (in column (c)), and show that amount as the entries in this column (for items 65, 69, and 73). If the entry in column (c) for any cost category is a zero, then enter in column (d) any negative amount which appears in column (b) for that cost category.

Items 74 and 75.—Self-explanatory.

Item 76.—Relief from the wage and salary controls of the Economic Stabilization Program has been provided for wage rate increases paid to low-wage workers to bring them to or toward \$3.50 an hour (\$2.75 an hour before May 1, 1973) and for binding (signed) labor contracts existing before November 8, 1971, and still effective in the budgeted fiscal year. Excess cost increases due to low-wage adjustments and/or pre-existing labor contracts are eligible for pass-through treatment in the calculation of allowable costs to be used for justifying price increases.

For low-wage adjustments, consider only low-wage increases up to \$3.50 (or \$2.75) an hour. If a wage rate increase causes an employee to earn more than \$3.50 (or \$2.75) an hour, include only the part of the increase up to \$3.50 (or \$2.75) an hour. When you compute wage increases, do not include the wage expense for low-wage workers hired into new positions in the budgeted fiscal year. However, if a wage increase is granted to such employees after the date they are hired, you may include the expense of the increase. Compute the low-wage excess as follows: Figure the total wage expense for low-wage workers in your last fiscal year. Multiply that amount by 5.5 percent (i.e., 0.055). If the total adjustment to be paid to low-wage workers in the budgeted fiscal year is less than or equal to 5.5 percent of last fiscal year low-wage expense, there is no low-wage excess eligible for pass-through. If the adjustment exceeds 5.5 percent of your low-wage expense for your last fiscal year, the amount of the

excess, and any excess of costs resulting from pre-existing wage contracts, is eligible for pass-through. For example, suppose a hospital grants a 5.5 percent wage increase to its employees who are not low-wage and a 20 percent to employees who are low-wage. The 20 percent increase to the low-wage employees did not cause any of the wage rates to exceed \$3.50 (or \$2.75) an hour. In the budgeted fiscal year, total adjustments to the ages of low-wage workers amounted to \$10,000 (20 percent of the low-wage base of \$50,000). Of that amount, \$2,750 represented the standard 5.5 percent increase and \$7,250 represented the excess over 5.5 percent. The \$7,250 would be eligible for treatment as a pass-through if all other requirements were met.

Make a similar computation of cost excesses to determine the eligibility of costs associated with binding, pre-existing labor contracts. Only pre-existing labor contract costs that are more than 5.5 percent of the total last fiscal year costs associated with those respective pre-existing labor contracts are to be included with low-wage excesses as eligible for pass-through.

The following shows how to get the entry for item 76:

(a) If the low-wage and pre-existing contract excesses amount to \$10,000, and

(b) the entry in item 65, column (d) is \$8,000, then \$8,000 of the total of \$10,000 in low-wage adjustments may be used as allowable cost increases, subject to the overall 6 percent limitation (the item 82 test) and the base period profit or net revenue margin limitation.

The final entry for item 76 is the lesser of item 65 (i.e., total excess wage expenses over the 5.5 percent limitation) or the sum of low-wage cost excesses and pre-existing labor contract cost excesses.

To receive consideration for pass-through treatment, attach detailed documentation to support low-wage and pre-existing contract excesses.

Item 77.—Pensions and group insurance cost increases, etc. (item 22(a), column (d)), are eligible for "spillover" treatment. The amount of pensions and group insurance eligible for spillover is the amount of increase in such costs which are more than the appropriate dollar limitation for the nonwage/salary cost category (as shown in the entry for item 66). However, the amount of spillover cannot cause the total of allowable cost increases in the nonwage/salary category to exceed actual cost increases in that category. For example, if:

(a) the entry in item 22(a), column (d) is \$10,000, and

(b) the entry in item 66, column (a) is \$8,000, and

(c) the entry in item 69, column (d) is \$1,000, then \$1,000 of the \$2,000 excess (the excess of pensions, etc., in item 22(a), column (d) over the nonwage/salary limitation in item 66, column (a)) for this cost category may be used as allowable cost increases, subject to the overall 6 percent limitation and the base period profit or net revenue margin limitation.

Item 78.—Self-explanatory.

Item 79.—When the actual cost increases in the nonwage cost category exceed the category limitation, and such cost increases are due to FICA and/or unemployment insurance, only that part of the nonwage cost increases due to FICA and unemployment insurance may be passed through above the category limitation. The maximum amount eligible for this provision is that amount shown as the entry in item 22(b), column (d).

For example, if:

(a) the entry in item 66, column (a) is \$10,000, and

(b) the entry in item 67, column (b) is \$12,000, and

(c) the entry in item 22(b), column (d) is \$3,000, and

(d) the entry in item 78=\$1,000, then

\$1,000 of the total \$3,000 in FICA and unemployment insurance increases may be used as additional allowable cost, subject to the overall 6 percent limitation and the base period profit or net revenue margin limitation.

Items 80-84.—Self-explanatory.

Items 85 and 86.—Do not include new technology/services revenues (item 35) as price increase revenues.

Item 87.—Self-explanatory.

Item 88.—If the price increase revenues in item 87 would not cause you to exceed your base period net revenue (profit) margin limitation, then item 88(a) is equal to item 87 less item 82.

If the amount of the allowable costs in item 82 is greater than or equal to the price increase revenues in item 87, then enter that part of the price increase revenues which causes the base period net revenues (profit) margin to be exceeded.

If the amount of price increase revenues shown in item 87 would cause you to exceed both your allowable cost limitation (item 82) and the base period net revenue (profit) margin limitation (item 53), then the amount subject to exception is equal to item 87 less item 82, plus any additional amount of realized revenues by which the base period limitation is exceeded.

Department of the Treasury — Internal Revenue Service — Economic Stabilization Program

Addendum to Form S-52 (Rev. 9-72)

Name of institution	Date
Address (number and street)	
City or town, State and ZIP code	

Part IX. — Price Increase Subject to Exception	Limitation (a)	Actual (b)	Allowable (c)	Excess (d)
Wage and Salary Cost Increases				
62 Limitation (item 21, col. (a) $\times$ 5.5%)	\$			
63 Actual (from item 21, col. (d))		\$		
64 Allowable (lesser of items 62 or 63; if negative, enter zero)			\$	
65 Excess over allowable (item 63 less item 64)				\$
Nonwage Cost Increases				
66 Limitation (item 32, col. (a) $\times$ 2.5%, except for FY beginning on or after 1/1/73, then show the amount in item 33, col. (a) $\times$ 2.7%)	\$			
67 Actual (item 32, col. (d), except for FY beginning on or after 1/1/73, then see instructions for col. (b) in this addendum)		\$		
68 Allowable (lesser of items 66 or 67; if negative, enter zero)			\$	
69 Excess over allowable (item 67 less item 68)				\$
Net New Technology Cost Increases (only for FY beginning before 1/1/73)				
70 Limitation (item 33, col. (a) $\times$ 1.7%)	\$			
71 Actual (from item 36; if negative, enter zero)		\$		
72 Allowable (lesser of items 70 or 71; if negative, enter zero)			\$	
73 Excess over allowable (item 71 less item 72)				\$
74 Totals	\$	\$	\$	\$
75 Enter the lesser of col. (b) or col. (c) of item 74				\$
Spillover and Pass-Throughs				
Low Wage and Pre-existing Contract Pass-Throughs				
76 Enter the lesser of item 65 or the sum of low-wage and pre-existing contract cost increase excesses, but not less than zero (see instructions)				\$
77 Enter the lesser of item 69 or the excess of item 22(a), col. (d) over item 66 (but not less than zero)				\$
FICA Pass-Through				
78 Subtract item 77 from item 69 and enter results (if negative, enter zero)			\$	\$
79 Enter the lesser of item 78 or item 22(b), col. (d) (but not less than zero)				\$
80 Total (sum of items 75, 76, 77, and 79)				\$
81 Maximum allowable cost increases (item 14, col. (a) $\times$ 6%)				\$
82 Justified allowable cost increases (least of items 74, col. (b), 80, or 81, if negative, enter zero)				\$
83 Express item 82 as a percentage of AAR in last FY (item 82 $\div$ item 14, col. (a))			%	\$
84 Cost increases in excess of allowable (item 74, col. (b) less item 82)				\$
85 Annualized increase in AAR resulting from price increases implemented to date in budgeted FY (see instructions)			% or	\$
86 Annualized amount of additional AAR proposed as a result of price increases in the budgeted FY (see instructions)			% or	\$
87 Total increases in AAR due to price (sum of items 85 and 86)			% or	\$
88 (a) Amount of price increase subject to exception (see instructions)				\$
(b) Express item 88(a) as a percentage of AAR in last FY (item 88(a) $\div$ item 14, col. (a))			%	\$

STATEMENT OF TAX ANALYSTS AND ADVOCATES

TAX ANALYSTS AND ADVOCATES,
Washington, D.C.

THE INTERNAL REVENUE SERVICE, THE FREEDOM OF INFORMATION ACT, AND THE
COST OF LIVING COUNCIL

The purpose of this statement is to describe, in general terms, the Internal Revenue Service's compliance and enforcement tasks; to describe recent developments, in practice and in court decisions, in the application of the Freedom of Information Act (FOIA) to the Revenue Service; and to describe some possible future applications of the FOIA to the Internal Revenue Service (IRS). Similarities between the compliance and enforcement activities of the Cost of Living Council and the Revenue Service indicate the FOIA requires the Council to disclose more information than it currently does.

GENERAL DESCRIPTION OF THE ACTIVITIES OF THE INTERNAL REVENUE SERVICE

There exists an extensive body of law determining tax liability. The IRS mission is in part "to encourage and achieve the highest possible degree of voluntary compliance with the tax laws."

Where the law is unclear, potential taxpayers are permitted to seek a ruling as to the requirements of the law; where possible tax liability is great, and, in certain instances where required by law, taxpayers virtually always seek such advance rulings. Information submitted to obtain these rulings, and the information incorporated into the texts of the rulings themselves, is often trade or financial data not required by law to be made public, or, in some cases, privileged trade secrets. The IRS has routinized procedures for dealing with these requests.

IRS is also responsible for "determining the extent of compliance and causes of noncompliance" with the law; the Service routinely refers many of these cases to the Justice Department for prosecution. The enforcement process deals with financial information not required to be disclosed to the public. Established procedures exist for dealing with taxpayers in this audit and compliance process.

These two different kinds of activity, advance rulings and enforcement, do not encompass all of the activities of the IRS, nor are these two activities equally important. These two activities are, nevertheless, major facets of IRS operations. In each case, as noted, established internal procedures exist for dealing with rulings and compliance. These procedures have taken the form of the Internal Revenue Manual. The actual advance rulings themselves are usually unpublished; of the estimated 30,000 rulings issued each year, about 600 are made public.

APPLICATION OF THE FREEDOM OF INFORMATION ACT TO THE IRS

In litigation under the Freedom of Information Act, Tax Analysts and Advocates (TA/A), the public interest tax law firm, and others, have established the principle that the Internal Revenue Manual and the unpublished file of advance rulings, as well as a number of other types of documents, are required to be disclosed. Public access to the IRS Manual is now an accomplished fact; court decisions ordering the IRS to open its rulings files are still being appealed by IRS attorneys.

1. When the IRS proposes regulations, public comments on those regulations are routinely made public. Existing IRS rules, however, purport to allow those who submit comments to keep them confidential by so requesting, whether the comments are statutorily confidential or not. Reg. Sec. 601.601(b). TA/A takes the position that this regulation is illegal, and has requested and received comments which the taxpayer originally deemed confidential.

2. The Treasury Department supervises and sets policy for the IRS. As a result of a TA/A lawsuit, the Office of Tax Analysis, and the Office of the Tax Legislative Counsel, both in Treasury, now make available to the public on a continuing basis indexed files of all its correspondence with persons outside the Executive Branch. The correspondence is routinely made public.

3. Thanks to another TA/A suit, Part XI of the Internal Revenue Manual was released to the public in December 1972. Part XI, which is over 800 pages long, deals with the operations of the IRS office which issues all IRS rulings and letters of technical advice. It outlines in detail the procedures followed by Service personnel in processing rulings, requests for technical advice, congressional correspondence, and legislative projects.

4. In early 1973, IRS released its "prime issues" list. This is a list of those topics that are currently much in dispute between the IRS and taxpayers. The list identifies issues which the IRS feels are so important that it will always go to court on them, rather than negotiate with taxpayers. This list has been published by TA/A in its weekly magazine, *Tax Notes*.

5. Under pressure from TA/A's and other's suits, and from taxpayers in general, IRS released almost all of the IRS Manual to the public by June 1973. The Manual details the internal operating procedures of the IRS and takes up 32 linear feet of shelf space. Virtually all of those portions of the Manual which relate to personnel procedures, administration, inspection, administrative appeals and settlements, and portions of the parts which relate to audits, investigation, delinquent returns and accounts, and intelligence are now available to the public.

IRS APPEALS A COURT DECISION FORCING FURTHER DISCLOSURE

In June 1973, TA/A won a federal District Court decision requiring the release of all IRS letter rulings, which are interpretations of the law issued to individual taxpayers upon taxpayer request. Also covered by the suit are technical advice memorandums and the rulings indexing and digesting system. These rulings, according to the court decision, are permanently filed for agency reference, constitute interpretations adopted by the agency, are relied on by the agency as precedents, and are "records" within the plain meaning of the FOIA. The court held that confidential financial information and trade secrets should simply be excised before rulings were made public; their presence did not defeat disclosure of the rest of the document containing them. The court concluded that the rulings were "private law," or "secret law," and that IRS claims that disclosure would disrupt its administrative processes were insubstantial.

The decision, by Judge Aubrey E. Robinson, Jr., *Tax Analysts and Advocates v. IRS*, — F. Supp. — (June 6, 1973) (D.D.C.), has been appealed by the IRS. The case has been fully briefed on appeal and now awaits oral argument and decision in the United States Court of Appeals for the District of Columbia.

More recently, in January 1974, U.S. District Court in Detroit has applied the Freedom of Information Act to compel the IRS to produce unpublished letter rulings that were requested by a defendant in a criminal suit for use in preparing its defense. *Fruehauf Corp. et al. v. Commissioner*, — F. Supp. —.

POSSIBLE FUTURE APPLICATIONS OF THE FOIA TO THE IRS

IRS "Technical Memorandums" are agency-adopted interpretations of Treasury Decisions and Treasury and IRS rulemakings. They are centrally filed and after filing are consulted by IRS personnel in connection with future rulings. These "tech memos" are never released to the public. Although these memos take the form of inter- or intra-agency memorandums, their content and use may require their disclosure despite the general exemption for such internal documents. Hence the current IRS practice may not be in compliance with law.

When IRS loses a court case, it usually issues a notice as to whether it acquiesces in the result on the specific facts, in the result generally under the legal principles set forth in the court opinion, or whether the IRS refuses to acquiesce in the decision at all. IRS action is noticed to the public in the form of a one-sentence statement. The public notice is invariably based on an internal memorandum setting forth an IRS position on the case; the memorandum concludes with a recommendation of "acquiescence" or "nonacquiescence" in the decision. These memos are centrally filed and used as precedent by IRS personnel. They are not released to the public. These memos may be required to be disclosed, and therefore current IRS practice may not be in compliance with law.

Finally, when the IRS considers a difficult ruling request, or faces an intricate policy question, it frequently requests the "Interpretative Division" in its Office of Chief Counsel to prepare a General Counsel's Memorandum or "GCM," which provides basic policy guidance for IRS personnel. In general, GCMs resemble the memos supporting recommendations of acquiescence or nonacquiescence. GCMs were once published, but they are now kept confidential.

GENERAL STATEMENT OF THE ACTIVITIES OF THE COST OF LIVING COUNCIL (COLC) OBJECTIVES

The goals of CoLC operations are (1) to moderate inflation, while minimizing adverse effects on supply; (2) to limit the speed and size of pass-through of cost

increases in the economic system, while not substantially inhibiting the expansion of capacity and supply; and (3) to prevent the onset of large inflationary wage increases.

GENERAL DESCRIPTION

The current price control program of CoLC, Phase IV, is a mandatory wage and price control program requiring prenotification of proposed price increases by companies with over \$100 million in annual sales, quarterly reports by companies over \$50 million in sales, and other regular reports from various sectors of the economy. The mandatory controls covered, in November 1973, about 50% of the economy on the price side and about 46% of the labor force. Current CoLC policy is to restrain price increases through cost absorption and profit margin constraints. Pass-through price increases are supposed to reflect only dollar-for-dollar increases in factory prices; no additional profit is allowed.

DETAILS

The program includes continual consultation by Cost of Living Council and Internal Revenue Service personnel (their role is described below) with companies, associations, and public groups. These consultations concern the CoLC regulations and also the prenotification and quarterly reports requirements; the consultations include public hearings.

Different sectors of the economy are treated differently in accordance with their "unique characteristics and structural problems." Firms may submit exception requests, seeking favored treatment from CoLC, where "genuine hardship and loss will result." *Cf.* James W. McLane, CoLC Deputy Director, "Outline of the Economic Stabilization Program," House General Government Appropriations Subcommittee, Nov. 9, 1973, page 10. Classes of firms may obtain exceptions. Some exception applications may be earmarked as having "precedential effect or presenting major policy issues." *Id.*, p. 30.

IRS ACTIVITIES

IRS conducts for CoLC a large-scale compliance investigation, audit, and enforcement process. Under the supervision of the CoLC, and with broad delegated operating authority, the IRS processes orders, makes decisions, and issues orders with respect to price stabilization submissions. IRS regional offices nationwide process special filings such as applications for modifications of prenotification requirements and applications for volatile pricing authority. The IRS economic stabilization arm has designed and refined specific internal management processes whereby field officials are held accountable for program quality, timeliness, effectiveness, and managerial effectiveness. Also, there are independent reviews conducted by a separate IRS audit organization that reviews the ongoing program from both operational and managerial aspects. Problem areas are formally identified and program reviews formally conducted. CoLC has issued detailed instructions to each IRS regional office for prompt posting of information into the CoLC ADP system.

IRS handles all prenotification and reporting submissions from larger companies except "certain particularly sensitive ones" which are processed by CoLC. *Cf.* E. F. Preston, IRS Ass't Comm'r (Stabilization), statement before the same hearing, p. 43. IRS reviews reports, audits profit margins, and monitors key industries, responds to requests for technical assistance, and answers public inquiries.

CONCLUSION

There is a good deal of similarity between the principles of operation of the IRS and the CoLC. There is a good deal of difference between the size and permanence of the two organizations. Another difference is that while the entire private sectors is subject to IRS jurisdiction, CoLC in recent months has been concentrating primarily on the largest labor and corporate entities.

Each agency administers a body of law which the agency interprets through regulations and which it further interprets in answers to requests from private parties. In the case of both IRS and CoLC, there are many cases in which prior agency answers to requests are practically or legally required before the private requestor can undertake a contemplated business transaction. Both agencies have formally established procedures, such as CoLC's "decisional check lists" and guidelines for requests for exceptions, for dealing with such requests. Both

agencies deal with confidential financial information and trade secrets in communications with private parties.

Both agencies publish manuals for their employees and have prepared training material for their employees. The IRS' Economic Stabilization Manual, Vol. XII of the general IRS Manual, was released to the public at about the same time as the rest of the Manual (see paragraph 5, above).

Both agencies compile and refer to their previous administrative rulings.

Both agencies conduct extensive auditing, review and compliance monitoring activities. These activities also are carried on under formally adopted intra-agency guidelines.

Given these similarities, it is probable that the FOIA could be applied to force CoLC disclosure of a number of documents not now made public.

Particularly susceptible to required disclosure, if not actually already disclosed, are CoLC internal guidelines as to the different treatment accorded different sectors of the economy based on unique characteristics and structural problems, different treatment for firms based on "genuine hardship and loss," different handling of exception applications or other requests based on "precedential effect," "major policy issues," or "sensitive" submissions.

SAMUEL HASTINGS-BLACK.

January 31, 1974.

APPENDIX TO VOLUME 1

CHRONOLOGY SHOWING MAJOR EVENTS IN THE OPERATION OF THE WAGE-PRICE PROGRAM

Date	Statutes	Executive orders	Regulations, orders	Comments
Aug. 15, 1970	Economic Stabilization Act of 1970 (Public Law 91-379).			Authorized the President to institute wage and price controls until Feb. 28, 1971.
Dec. 17, 1970	Public Law 91-558			Extended ESA to Mar. 31, 1971.
Mar. 29, 1971		Executive Order 11588		Established Construction Industry Stabilization Committee to stabilize wages and prices in the construction industry.
Mar. 31, 1971	Public Law 92-8			Extended ESA to May 31, 1971.
May 18, 1971	Public Law 92-15			Extended ESA to Apr. 30, 1972.
Aug. 15, 1971		Executive Order 11615		Phase I announced; instituted 90-day freeze on wages, prices, and rents; established Cost of Living Council to administer controls.
Aug. 17, 1971			COLC Order No. 1	Delegated authority for administration of phase I to the Office of Emergency Preparedness.
Aug. 19, 1971			OEP Order No. 1	Delegated enforcement authority for phase I to Secretary of Treasury.
Oct. 15, 1971		Executive Order 11627 (superseded Executive Order 11615).	COLC Order Nos. 3 and 4.	Set up structure for phase II; delegated administrative authority to Pay Board and Price Commission.
Nov. 14, 1971			COLC Order No. 5.	Delegated authority for phase II enforcement to Secretary of the Treasury.
Dec. 22, 1971	Economic Stabilization Act Amendments of 1971 (Public Law 92-210).			Extended ESA to Apr. 30, 1973; extensively amended ESA.
Dec. 22, 1971		Executive Order 11640 (superseded Executive Order 11627).		Reflected changes in phase II resulting from Public Law 92-210.
Mar. 25, 1972		Executive Order 11660		Amended Executive Order 11640.
June 29, 1972		Executive Order 11674		Do.
Jan. 12, 1973		Executive Order 11695 (superseded Executive Order 11588 and Executive Order 11640).	COLC Order No. 14.	Phase III announced; abolished Pay Board and Price Commission; emphasis on voluntary compliance.
Do.			COLC Order No. 15.	Delegation of phase III enforcement authority to IRS.
Apr. 30, 1973	Economic Stabilization Act Amendments of 1973 (Public Law 93-28).			Extended ESA to Apr. 30, 1974; also added substantive amendments to statute.
June 13, 1973		Executive Order 11723 (Executive Order 11695 still in effect).		Announced phase III½; 60-day freeze on prices.
July 18, 1973		Executive Order 11730 (Executive Order 11723 superseded; Executive Order 11695 still in effect).		Announced phase IV; emphasized sector-by-sector approach; administered by IRS and COLC directly.
Aug. 10, 1973			COLC Order No. 37.	Delegated authority for phase IV enforcement to IRS.

ECONOMIC STABILIZATION ACT OF 1970, AS AMENDED

SEC. 2. Title II of the Act entitled "An Act to amend the Defense Production Act of 1950, and for other purposes," approved August 15, 1970 (Public Law 91-379), as amended, is amended to read as follows:

(219)

TITLE II—COST OF LIVING STABILIZATION

SEC. 201. Short title.—This title may be cited as the 'Economic Stabilization Act of 1970'.

SEC. 202. Findings.—It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest, and that in order to maintain and promote competition in the petroleum industry and assure sufficient supplies of petroleum products to meet the essential needs of various sections of the Nation, it is necessary to provide for the rational and equitable distribution of those products. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to implement promptly and effectively the program authorized by this title.

SEC. 203. Presidential authority.—(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—

(1) stabilize prices, rents, wages and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title;

(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth; and

(3) provide after public hearing, conducted with such notice, under such regulations and subject to such review as the exigencies of the case may, in his judgment, make appropriate for the establishment of priorities of use and for systematic allocation of supplies of petroleum products including crude oil in order to meet the essential needs of various sections of the Nation and to prevent anticompetitive effects resulting from shortages of such products.

Such orders and regulations shall provide for the making of such adjustments as may be necessary to prevent gross inequities, and shall be consistent with the standards issued pursuant to subsection (b).

(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rate, corporate dividend, and similar transfers which are consistent with the purposes of this title and orderly economic growth. Such standards shall—

(1) be generally fair and equitable;

(2) provide for the making of such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits;

(3) take into account changes in productivity and the cost of living, as well as such other factors consistent with the purposes of this title as are appropriate;

(4) provide for the requiring of appropriate reductions in prices and rents whenever warranted after consideration of lower costs, labor shortages, and other pertinent factors; and

(5) call for generally comparable sacrifices by business and labor as well as other segments of the economy.

(c) (1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract) scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (A) related to such wage or salary, and (B) was executed prior to August 15, 1971, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

(2) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

(A) such increases were provided for by law or contract prior to August 15, 1971; and

(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

(d) Notwithstanding any other provision of this title, this title shall be implemented in such a manner that wage increases to any individual whose earnings are substandard or who is amongst the working poor shall not be limited in any manner, until such time as his earnings are no longer substandard or he is no longer a member of the working poor. The President shall prescribe regulations defining for the purposes of this subsection the term "substandard earnings," but in no case shall such term be defined to mean earnings less than those resulting from a wage or salary rate which yields \$3.50 per hour or less.

(e) Whenever the authority of this title is implemented with respect to significant segments of the economy, the President shall require the issuance of regulations or orders providing for the stabilization of interest rates and finance charges, unless he issues a determination, accompanied by a statement or reasons, that such regulations or orders are not necessary to maintain such rates and charges at levels consonant with orderly growth.

(f) The authority conferred by this section shall not be exercised to preclude the payment of any increase in wages—

(1) required under the Fair Labor Standards Act of 1938, as amended, or effected as a result of enforcement action under such Act; or

(2) required in order to comply with wage determinations made by any agency in the executive branch of the Government pursuant to law for work (A) performed under contracts with, or to be performed with financial assistance from, the United States or the District of Columbia, or any agency or instrumentality thereof, or (B) performed by aliens who are immigrants or who have been temporarily admitted to the United States pursuant to the Immigration and Nationality Act; or

(3) paid in conjunction with existing or newly established employee incentive programs which are designed to reflect directly increases in employee productivity.

(g) For the purposes of this title, the term "wages" and "salaries" do not include reasonable contributions by any employer pursuant to a compensation adjustment for—

(1) any pension, profit sharing, or annuity and savings plan which meets the requirements of section 401(a), 404(a)(2), or 403(b) of the Internal Revenue Code of 1954;

(2) any group insurance plan; or

(3) any disability and health plan; unless the President determines that the contributions for such purposes made by any such employer are unreasonably inconsistent with the standards for wage, salary, and price increases issued under subsection (b) or under any other provision of this title. Employees in all industries subject to controls under this title shall be treated equally for purposes of this title.

(h) No State or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation or policy.

(i) Rules, regulations, and orders promulgated under this title shall insofar as practicable be designed to encourage labor-management cooperation for the purpose of achieving increased productivity, and the Executive Director of the National Commission on Productivity shall when appropriate be consulted in the formulation of policies, rules, regulations, orders, and amendments under this title.

(j) Nothing in this title may be construed to authorize or require the withholding or reservation of any obligational authority provided by law or of any funds appropriated under such authority.

SEC. 204. Delegation.—The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he deems appropriate, or to boards, commissions, and similar entities composed in whole or in part of members appointed to represent different sectors of the economy and the general public. Members of such boards, commissions, and similar entities shall be appointed by the President by and with the advice and consent of the Senate; except that—

(1) the foregoing requirement with respect to Senate confirmation does not apply to any member of any such board, commission, or similar entity (other than the Chairman of the Pay Board, established by section 7 of Executive Order Numbered 11627 of October 15, 1971, and the Chairman of the Price Commission, established by section 8 of such Executive order) who is serving pursuant to appointment by the President, on such board, date of enactment of the Economic commission, or similar entity on the Stabilization Act Amendments of 1971, and who continues to serve, pursuant to such appointment, on such appointment, on such board, commission or similar entity after such date; and

(2) any person serving in the office of Chairman of such Pay Board, and any person serving in the office of Chairman of such Price Commission, on the date of enactment of the Economic Stabilization Act Amendments of 1971, may continue to serve in such capacity on an interim basis without regard to the foregoing requirement with respect to Senate confirmation until the expiration of sixty days after the date of enactment of the Economic Stabilization Act Amendments of 1971, and the provisions of sections 910–913 of title 5, United States Code, shall be applicable with respect to the procedure to be followed in the Senate in considering the nomination of any person to either of such offices submitted to the Senate by the President during such sixty-day period, except that references in such provisions to a 'resolution with respect to a reorganization plan' shall be deemed for the purpose of this section to refer to such nominations.

Where such boards, commissions, and similar entities are composed in part of members who serve on less than a full-time basis, legal authority shall be placed in their chairmen who shall be employees of the United States and who shall act only in accordance with the majority vote of members. Nothing in section 203, 205, 207, 208 or 209 of title 18, United States Code, shall be deemed to apply to any member of any such board, commission, or similar entity who serves on less than a full-time basis because of membership on such board, commission, or entity.

SEC. 205. Confidentiality of information.—(a) Except as provided in subsection (b), all information reported to or otherwise obtained by any person exercising authority under this title which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential for the purposes of that section, except that such information may be disclosed to other persons empowered to carry out this title solely for the purpose of carrying out this title or when relevant in any proceeding under this title.

(b) (1) Any business enterprise subject to the reporting requirements under section 13.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973, shall make public any report (except for matter excluded in accordance with paragraph (2)) so required which covers a period during which that business enterprise charges a price for a substantial product which exceeds by more than 1.5 per centum the price lawfully in effect for such product on January 10, 1973, or on the date twelve months preceding the end of such period, whichever is later. As used in this subsection, the term "substantial product" means any single product or service which accounted for 5 per centum or more of the gross sales or revenues of a business enterprise in its most recent full fiscal year.

(2) A business enterprise may exclude from any report made public pursuant to paragraph 1 any information or data reported to the Cost of Living Council, proprietary in nature, which concerns or relates to the amount or sources of its income, profits, losses, costs, or expenditures but may not exclude from such report, data, or information, so reported, which concerns or relates to its prices for goods and services.

(3) Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from public annual re-

ports to the Securities and Exchange Commission pursuant to section 13 or 15 (d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of the business enterprise.

SEC. 206. Subpena power.—The head of an agency exercising authority under this title, or his duly authorized agent, shall have authority, for any purpose related to this title, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of refusal to obey a subpoena served upon any person under the provisions of this section, the head of the agency authorizing such subpoena or his delegate, may request the Attorney General to seek the aid of the district court of the United States for any district in which such person is found to compel such person, after notice, to appear and give testimony, or to appear and produce documents before the agency.

SEC. 207. Administrative procedure.—(a) The functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, except as to the requirements of section 552, 553, and 555(e) of title 5, United States Code.

(b) Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings were deemed advisable, for considering such requests for action under this section: *Provided*, That such agency shall issue no order which has the effect of reducing wages, or salaries in effect, or proposed to be put into effect, in an appropriate employee unit unless such order is made on the record after opportunity for a hearing. Not less than thirty days after issuance of such an order a statement of explanation shall be directed to the affected parties and made available to the public. Such statement shall include a full explanation of the reasons why the existing wage or salary, or proposed wage or salary adjustment, does not meet the requirements of or the standards established by the regulations prescribed by the agency.

(c) To the maximum extent possible, the President or his delegate shall conduct formal hearings for the purpose of hearing arguments or acquiring information bearing on a change or a proposed change in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers, which have or may have a significantly large impact upon the national economy, and such hearings shall be open to the public except that a private formal hearing may be conducted to receive information considered confidential under section 205 of this title.

SEC. 208. Sanctions; criminal fine and civil penalty.—(a) Whoever willfully violates any order or regulation under this title shall be fined not more than \$5,000 for each violation.

(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than \$2,500 for each violation.

SEC. 209. Injunctions and other relief.—Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

SEC. 210. Suits for damages or other relief.—(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of

the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater :

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than \$100 or more than \$1,000; except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, That where the overcharge is not willful within the meaning of section 208(a) of this Act, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation or such claim.

(c) For the purposes of this section, the term "overcharge" means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

SEC. 211. Judicial review.—(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d) (2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of the entry of judgment by the district court.

(c) In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on

the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

(d) (1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

(e) (1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting, such permanent injunctive relief, if any, as it deems appropriate.

(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

SEC. 212. Personnel.—(a) Any agency or officer of the Government carrying out functions under this title is authorized to employ such personnel as the President deems necessary to carry out the purposes of this title.

(b) The President may appoint five officers to be responsible for carrying out functions of this title of whom three shall be compensated at the rate prescribed for level III of the Executive Schedule (5 U.S.C. 5314) and two at the rate prescribed for level V of the Executive Schedule (5 U.S.C. 5316). Appropriate titles and the order of succession among such officers may be designated by the President.

(c) Any member of a board, commission, or similar entity established by the President pursuant to authority conferred by this title who serves on less than a full-time basis shall receive compensation from the date of his appointment at a rate equal to the per diem equivalent of the rate prescribed for level IV of the Executive Schedule (5 U.S.C. 5315) when actually engaged in the performance of his duties as such member.

(d) (1) In addition to the number of positions which may be placed in GS-16, 17, and 18, under section 5108 of title 5, United States Code, not to exceed twenty positions may be placed in GS-16, 17, and 18, to carry out the functions under this title.

(2) The authority under this subsection shall be subject to the procedures prescribed under section 5108 of title 5, United States Code, and shall continue only for the duration of the exercise of functions under this title.

(e) The President may require the detail of employees from any executive agency to carry out the purposes of this title.

(f) The President is authorized to appoint without regard to the civil service laws, such advisory committees as he deems appropriate for the purpose of consultation with and advice to the President in the performance of his functions under this title. Members of advisory committees, other than those regularly employed by the Federal Government, while attending meetings of such committees or while otherwise serving at the request of the President may be paid compensation at rates not exceeding those authorized for individuals under section 5332 of title 5, United States Code, and, while so serving away from their homes or regular places of business may be allowed travel expenses, including per diem as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

(g) (1) Under such regulations as the President may prescribe, officers and employees of the Government who are appointed, without a break of service of one or more work days, to any position for carrying out functions under this title are entitled, upon separation from such position, to reemployment in the position occupied at the time of appointment or in a position of comparable grade and salary.

(2) An officer or employee who, at the time of his appointment under paragraph (1) of this subsection, is covered by section 8336(c) of title 5, United States Code, shall continue to be covered thereunder while carrying out functions under this title.

SEC. 213. Experts and consultants.—Experts and consultants may be employed, as authorized by section 3109 of title 5, United States Code, for the performance of functions under this title, and individuals so employed may be compensated at rates not to exceed the per diem equivalent of the rate for grade 18 of the General Schedule established by section 5332 of title 5, United States Code. Such contracts may be renewed from time to time without limitation. Service of an individual as an expert or consultant under this section shall not be considered as employment or the holding of an office or position bringing such individual within the provisions of section 3323(a) of title 5, United States Code, section 872 of the Foreign Service Act of 1946, or any other law limiting the reemployment of retired officers or employees.

SEC. 214. Small business. (a) It is the sense of the Congress that small business enterprises should be encouraged to make the greatest possible contribution toward achieving the objectives of this title.

(b) In order to carry out the policy stated in subsection (a)—

(1) the Small Business Administration shall to the maximum extent possible provide small business enterprises with full information concerning (A) the provisions of this title relating or of benefit to such enterprises, and (B) the activities of the various departments and agencies under this title;

(2) in administering this title, such exemptions shall be provided for small business enterprises as may be feasible without impeding the accomplishment of the purposes of this title; and

(3) in administering this title, special provision shall be made for the expeditious handling of all requests, applications, or appeals from small business enterprises.

SEC. 215. Mass transportation systems.—No company, or other entity constituting a public benefit corporation, charged by law or contract with the responsibility to operate a mass transportation facility or facilities, the fares of which are not otherwise regulated, shall increase any fare without first obtaining approval under this section from the President or his delegate.

SEC. 216. Reports.—(a) In transmitting the Economic Report required under section 3(a) of the Employment Act of 1946 (15 U.S.C. 1022), the President shall include a section describing the actions taken under this title during the preceding year and giving his assessment of the progress attained in achieving the purposes of this title. The President shall also transmit quarterly reports to the Congress not later than thirty days after the close of each calendar quarter describing the actions taken under this title during the preceding quarter and giving his assessment of the progress attained in achieving the purposes of this title.

(b) In carrying out his authority under this title, the President shall study and evaluate the relationship between excess profits, the stabilization of the economy, and the creation of new jobs. The results of such study shall be incorporated in the quarterly reports referred to in subsection (a).

217. Funding.—(a) There are authorized to be appropriated to the President, to remain available until expended, such sums as may be necessary to carry out the provisions of this title.

(b) The President may accept and use in furtherance of the purposes of this title money, funds, property, and services of any kind made available for such purposes by gift, devise, bequest, grant, or otherwise.

SEC. 218. Expiration.—The authority to issue and enforce orders and regulations under this title expires at midnight April 30, 1974, but such expiration shall not affect any action or pending proceeding, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to May 1, 1974.

SEC. 219. Ratification.—The assignment of personnel and expenditure of funds pursuant to the authority conferred on the President by this title prior to the date of enactment of the Economic Stabilization Act Amendments of 1971 are hereby approved, ratified, and confirmed.

SEC. 220. Severability.—If any provision of this title or the application of such provision to any person or circumstances is held invalid, the remainder of the title, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

EXECUTIVE ORDERS

No. 11588

April 3, 1971, 36 F.R. 6339

PROVIDING FOR THE STABILIZATION OF WAGES AND PRICES IN THE CONSTRUCTION INDUSTRY

WHEREAS, the stabilization of wages and prices in the construction industry is essential to the maintenance of a strong national economy; and

WHEREAS, wages and prices in the construction industry have tended in recent years to increase at a rate greater than that for the economy as a whole; and

WHEREAS, the Congress has expressed its concern over the unrestrained rise in wages and prices through the enactment of the Economic Stabilization Act of 1970 (84 Stat. 799 as amended);⁴³ and

WHEREAS, it was necessary to suspend the prevailing rate provisions of the Davis-Bacon Act in order to assist in alleviating the inflationary spiral of wages and prices in the construction industry, which suspension is no longer required due to the establishment of an equitable stabilization plan under this order; and

⁴³ 12 U.S.C.A. § 1904 note.

WHEREAS, the national leaders of labor and management in the construction industry have indicated, since the suspension of the Davis-Bacon Act, that under such an order they will participate with the Government in fair measures to achieve greater wage and price stability; but are unable to agree on any voluntary arrangement; and

WHEREAS, stabilization of wages and prices is most effectively achieved when accompanied by positive action of labor and management; and

WHEREAS, this order is required to establish an arrangement for the application of general criteria by an operating structure with a minimum of Government involvement and sanctions within which labor and management may act to effectuate the stabilization of wages and prices consistent with and in furtherance of effective collective bargaining in the industry.

NOW, THEREFORE, by virtue of the authority vested in me by the Economic Stabilization Act of 1970 (84 Stat. 799 as amended) and as President of the United States, it is ordered as follows:

Section 1(a). A Construction Industry Stabilization Committee (hereafter referred to as "Committee") is hereby established to assure general conformance of any increase in any wage or salary in the construction industry to the provisions of this order.

(b) The Committee shall be composed of twelve members appointed by the Secretary of Labor and selected as follows: four of the members shall be representative of labor organizations in the construction industry; four of the members shall be representative of employers in the construction industry; and four of the members shall be representative of the public. The Secretary of Labor shall appoint one of the public members as chairman of the committee.

Sec. 2. Associations of contractors and national and international unions shall jointly establish craft dispute boards (hereinafter referred to as "boards") to determine whether wages and salaries are acceptable in accordance with the criteria established in section 6. Each board shall be composed of appropriate labor and management representatives.

Sec. 3(a). It shall be the responsibility of each board, in relation to the craft or branch over which it has jurisdiction, to provide advice and assistance in an effort to resolve any unresolved collective bargaining disputes involving wages and salaries and to promptly examine every collective bargaining agreement negotiated on or after the date of this order and to determine, in accordance with the criteria established in section 6, whether wage and salary increases in the agreement are acceptable and may thus be approved. The board shall make determinations within a reasonable time and shall notify the parties and the Committee of action taken. When it is determined by the board that a wage or salary increase is not acceptable, the board shall also notify the Secretary of Labor.

(b) Each board shall also have the authority to examine collective bargaining agreements negotiated prior to the date of this order which contain wage or salary increases scheduled to take effect on or after such date to determine whether any increase is unreasonably inconsistent with the criteria established in section 6.

Sec. 4(a). Upon receipt of notification by a board that it has found a wage or salary increase acceptable, the Committee shall have fifteen days in which to determine whether it will assume jurisdiction over the matter. If the Committee does not determine within that time, and so notify the parties and the board, that it will assume jurisdiction, the board's determination will be deemed final and the increase may take effect. If the Committee determines that it will assume jurisdiction it shall be a violation of this order to implement the increase unless and until the Committee affirms the board's initial determination. The Committee shall notify the parties, the board and the Secretary of Labor of its final action.

(b) The Committee is also authorized, upon its own motion, if a board has not yet reported or an appropriate board has not been established, to review any proposed wage or salary increase to determine its acceptability.

(c) Unless and until an increase in wage or salary has been approved in accordance with the provisions of sections 3(a) and 4 of this order, it shall be a violation of this order to put such wage or salary increase into effect.

Sec. 5. Upon a determination by a board or the Committee that a proposed wage or salary increase is not acceptable and certification of that determination by the Secretary of Labor, the following actions shall be taken:

(a) In implementing the provisions of the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494, as amended)⁴⁴ and related statutes the provisions of which are dependent upon determinations by the Secretary of Labor under the Davis-Bacon

⁴⁴ 40 U.S.C.A. § 27a.

Act, and including state statutes or laws requiring similar wage standards, the Secretary of Labor and all states shall not take into consideration any wage or salary increase in excess of that found to be acceptable in making determinations under that Act and related statutes.

(b) In order to assure that unacceptable wage rates shall not be utilized in Federal or federally related construction, the heads of all Federal departments and agencies, subject to the direction and coordination of the Secretary of Labor:

(1) shall review all plans for construction and financial assistance for construction in localities in which wage or salary increases have been certified by the Secretary of Labor to be unacceptable and shall, on the basis of that review, determine whether such plans can be approved or continued; and

(2) shall review current and prospective construction contracts for Federal construction and for construction on projects receiving Federal financial assistance in the area affected by a certification by the Secretary of Labor and shall, on the basis of such review, determine whether such contracts can be awarded or continued.

(c) The Committee and the boards shall make public their determinations, specifying the craft and area affected and the wages or salaries deemed unacceptable.

(d) Any other action authorized by law to carry out the purposes and policy of this order shall be available to the Secretary of Labor to assure the stabilization of wages and prices in the construction industry.

Sec. 6. The following criteria shall be applied in determining whether any wage or salary increase is acceptable:

(a) Acceptable economic adjustments in labor contracts negotiated on or after the date of this order will be those normally considered supportable by productivity improvement and cost of living trends, but not in excess of the average of the median increases in wages and benefits over the life of the contract negotiated in major construction settlements in the period 1961 to 1968.

(b) Equity adjustments in labor contracts negotiated on or after the date of this order may, where carefully identified, be considered over the life of the contract to restore traditional relationships among crafts in a single locality and within the same craft in surrounding localities.

Sec. 7. The parties to a labor contract negotiated in the construction industry shall promptly submit that contract to the appropriate board or boards. Where there is no appropriate board to consider the acceptability of a proposed wage or salary increase, the affected national or international union, and the affected association of contractors shall promptly submit that contract to the Committee.

Sec. 8. The Interagency Committee on construction (hereinafter referred to as "Interagency Committee"), is hereby established to develop criteria for the determination of acceptable prices in construction contracts as well as criteria for acceptable compensation, including bonuses stock options and the like. Officers and employees of Federal departments and agencies shall be designated to serve as members of the Interagency Committee by the Secretary of Housing and Urban Development who shall also designate its chairman. The Interagency Committee shall consult with the Secretary of Labor, with major Government procurement agencies and with the Committee in developing such criteria and concerning the application of such criteria. Until criteria have been developed and applied and prices and compensation are determined to be unacceptable, prices, and compensation shall not be deemed in violation of this order.

Sec. 9. In the conduct of every Federal or federally-assisted construction project or program the affected Federal agency shall assure the conformance of such project or program with the criteria established in section 8.

Sec. 10. The Committee and the Interagency Committee, subject to approval by the Secretary of Labor, and the Secretary of Labor are authorized to issue such rules and regulations as may be necessary to provide for the expeditious and effective conduct of their responsibilities under this order and to effectuate its purposes. Such authority of the Committee under this section shall include the authority to issue such rules and regulations as may be necessary to assure the effective operation of any board which may be established under this order, and to provide for the resolution of impasses within any board.

Sec. 11(a). The term "construction" shall mean, for the purpose of this order (1) all work relating to the erecting, constructing, altering, remodeling, painting, or decorating of installations such as buildings, bridges, highways and the like, when performed on a contract basis, but shall not include maintenance work performed by workers employed on a permanent basis in a particular plant or facility for the purpose of keeping such plant or facility in efficient

operating condition; (2) the transporting of materials and supplies to or from a particular building or project by the workers of the contractor or subcontractor performing the construction or the manufacturing of materials, supplies, or equipment on the site of a project by such workers; and (3) all other work classified as construction in section 5.2(g) or Part 5, Title 29 of the Code of Federal Regulations.

(b) The term "wage or salary" shall mean, for the purpose of this order, all wage or salary rate scheduled and economic benefits established pursuant to a collective bargaining agreement in the construction industry.

Sec. 12(a). Expenses of the Committee and the Interagency Committee shall be paid from such appropriations to the Department of Labor and other Federal agencies as may be made available therefor.

(b) All departments and agencies of the Federal Government are authorized and directed to co-operate with the Committee and the Interagency Committee in order that they may carry out their responsibilities under this order.

Sec. 13. There shall be periodic examination of the effectiveness of this order to determine whether further measures will be required to effectuate a stabilization of wages and prices in the construction industry.

Sec. 14. This Order shall be effective immediately.

RICHARD NIXON.

THE WHITE HOUSE,
March 29, 1971.

No. 11615

August 17, 1971, 36 F.R. 15727

PROVIDING FOR STABILIZATION OF PRICES, RENTS, WAGES, AND SALARIES

WHEREAS, in order to stabilize the economy, reduce inflation, and minimize unemployment, it is necessary to stabilize prices, rents, wages and salaries; and

WHEREAS, the present balance of payments situation makes it especially urgent to stabilize prices, rents, wages, and salaries in order to improve our competitive position in world trade and to protect the purchasing power of the dollar:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Economic Stabilization Act of 1970 (P.L. 91—379, 84 Stat. 799), as amended,⁹² it is hereby ordered as follows:

Section 1. (a) Prices, rents, wages, and salaries shall be stabilized for a period of 90 days from the date hereof at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual business, firm or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly in any transaction prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay any transaction wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

(b) Each person engaged in the business of selling or providing commodities or services shall maintain available for public inspection a record of the highest prices or rents charged for such or similar commodities or services during the 30-day period ending August 14, 1971.

(c) The provisions of sections 1 and 2 hereof shall not apply to the prices charged for raw agricultural products.

Sec. 2. (a) There is hereby established the Cost of Living Council which shall act as an agency of the United States and which is hereinafter referred to as the Council.

(b) The Council shall be composed of the following members: The Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the

⁹² 50 U.S.C.A. App. § 2091.

Secretary of Labor, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Director of the Office of Emergency Preparedness, and the Special Assistant to the President for Consumer Affairs. The Secretary of the Treasury shall serve as Chairman of the Council and the Chairman of the Council of Economic Advisers shall serve as Vice Chairman. The Chairman of the Board of Governors of the Federal Reserve System shall serve as adviser to the Council.

(c) Under the direction of the Chairman of the Council a Special Assistant to the President shall serve as Executive Director of the Council, and the Executive Director is authorized to appoint such personnel as may be necessary to assist the Council in the performance of its functions.

Sec. 3. (a) Except as otherwise provided herein, there are hereby delegated to the Council all of the powers conferred on the President by the Economic Stabilization Act of 1970.

(b) The Council shall develop and recommend to the President additional policies, mechanisms, and procedures to maintain economic growth without inflationary increases in prices, rents, wages, and salaries after the expiration of the 90-day period specified in Section 1 of this Order.

(c) The Council shall consult with representatives of agriculture, industry, labor and the public concerning the development of policies, mechanisms and procedures to maintain economic growth without inflationary increases in prices, rents, wages, and salaries.

(d) In all of its actions the Council will be guided by the need to maintain consistency of price and wage policies with fiscal, monetary, international and other economic policies of the United States.

(e) The Council shall inform the public, agriculture, industry, and labor concerning the need for controlling inflation and shall encourage and promote voluntary action to that end.

Sec. 4. (a) The Council, in carrying out the provisions of this Order may (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemptions, (iii) issue regulations and orders, and (iv) take such other actions as it determines to be necessary and appropriate to carry out the purposes of this Order.

(b) The Council may redelegate to any agency, instrumentality or official of the United States any authority under this Order, and may, in administering this Order, utilize the services of any other agencies, Federal or State, as may be available and appropriate.

(c) On request of the Chairman of the Council, each Executive department or agency is authorized and directed, consistent with law, to furnish the Council with available information which the Council may require in the performance of its functions.

(d) All Executive departments and agencies shall furnish such necessary assistance as may be authorized by section 214 of the Act of May 3, 1945 (59 Stat. 134 ; 31 U.S.C. 691).

Sec. 5. The Council may require the maintenance of appropriate records or other evidence which are necessary in carrying out the provisions of this Order, and may require any person to maintain and produce for examination such records or other evidence, in such form as it shall require, concerning prices, rents, wages, and salaries and all related matters. The Council may make such exemptions from any requirement otherwise imposed as are consistent with the purposes of this Order. Any type of record or evidence required under regulations issued under this Order shall be retained for such period as the Council may prescribe.

Sec. 6. The expenses of the Council shall be paid from such funds of the Treasury Department as may be available therefor.

Sec. 7. (a) Whoever willfully violates this Order or any order or regulation issued under authority of this Order shall be fined not more than \$5,000 for each such violation.

(b) The Council shall in its discretion request the Department of Justice to bring actions for injunctions authorized under Section 205 of the Economic Stabilization Act of 1970 whenever it appears to the Council that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order issued pursuant to this Order.

RICHARD NIXON.

THE WHITE HOUSE,
August 15, 1971.

No. 11627

October 16, 1971, 36 F.R. 20139

FURTHER PROVIDING FOR THE STABILIZATION OF THE ECONOMY

On August 15, 1971, I issued Executive Order No. 11615 providing for the stabilization of prices, rents, wages, and salaries, for a period of 90 days from the date of that Order. That Order also established the Cost of Living Council and charged it with the primary responsibility for administering the stabilization program, and for recommending to me additional policies and mechanisms to permit an orderly transition from the 90-day general price, rents, wages, and salaries freeze imposed by Executive Order No. 11615 to a more flexible and selective system of economic restraints.

I have received recommendations from the Cost of Living Council, and have determined that the intent of the Economic Stabilization Act of 1970 (P.L. 91-379; 84 Stat. 799), as amended, can more effectively be carried out and the goals I specified in my speech to the Nation on October 7, 1971, can more effectively be achieved, on and after the date of this Order, by substituting this Order for Executive Order No. 11615, as amended. Notwithstanding this substitution, the findings which I made in the preamble of Executive Order No. 11615 of August 15, 1971, are, after careful reconsideration, reaffirmed.

Under this Order, the Cost of Living Council will be continued and will be given broad authority to stabilize prices, rents, wages, and salaries for so long as the Economic Stabilization Act of 1970, as amended, is in effect or until such other time as the President may hereafter prescribe. This, in effect, will result in the establishment of a new economic stabilization program. That program will be carried out through a Pay Board and a Price Commission each of which is newly established by this Order. The Pay Board will be a tripartite organization composed of five representatives of organized labor, five representatives of business, and five representatives of the general public. The Price Commission will be composed of seven members, all from the general public. The President will appoint all members of both the Board and the Commission and will designate the Chairman of each, who will be a full-time official of the United States.

The Cost of Living Council will establish broad stabilization goals for the Nation, and the Pay Board and Price Commission, acting through their respective Chairmen, will prescribe specific standards, criteria, and regulations, and make rulings and decisions aimed at carrying out these goals.

In addition, this Order establishes three new committees to assist the Council, the Pay Board, and the Price Commission in the performance of their functions. They are the Committee on Interest and Dividends, an interagency body made up of the heads of various Federal departments and agencies having financial regulatory functions; the Committee on the Health Services Industry; and the Committee on State and Local Government Cooperation.

Finally, this Order modifies Executive Order No. 11588 so as to bring the Construction Industry Stabilization Committee established by that Order into the framework of the new economic stabilization program established by this Order.

NOW THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970, as amended, it is hereby ordered as follows:

Section 1. (a) The Pay Board and Price Commission established by sections 7 and 8 of this Order, respectively, and the Chairman of each of those bodies, shall, pursuant to goals of the Cost of Living Council, take such steps as may be necessary, and authorized by or pursuant to this Order, to stabilize prices, rents, wages, and salaries. Pending action under this Order, and except as otherwise provided in section 202 of the Economic Stabilization Act of 1970, as amended, prices, rents, wages, and salaries are stabilized effective as of August 16, 1971, at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm, or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary, or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, directly or indirectly, in any transaction, prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay, in any transaction, wages or salaries in any form, or to use any means to obtain

payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

(b) Each person engaged in the business of selling or providing commodities or services shall maintain available for public inspection a record of the highest prices or rents charged for such or similar commodities or services during the 30-day period ending August 14, 1971.

(c) The provisions of sections 1 and 2 of this Order shall not apply to the prices charged for raw agricultural products.

Sec. 2. (a) The Cost of Living Council (hereinafter referred to as the Council), established by section 2 of Executive Order No. 11615 of August 15, 1971, is hereby continued and shall continue to act as an agency of the United States.

(b) The Council shall be composed of the following members: The Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Housing and Urban Development, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Director of the Office of Emergency Preparedness, the Special Assistant to the President for Consumer Affairs, and such others as the President may, from time to time, designate. The Secretary of the Treasury shall serve as Chairman of the Council and the Chairman of the Council of Economic Advisers shall serve as Vice Chairman. The Chairman of the Board of Governors of the Federal Reserve System shall serve as adviser to the Council.

(c) There shall be a Director of the Cost of Living Council who shall be appointed by the President, be a member of the Council, be a full-time official of the United States, and be the Council's chief executive officer.

Sec. 3. (a) Except as otherwise provided herein, there are continued to be delegated to the Council all of the powers conferred upon the President by the Economic Stabilization Act of 1970, as amended.

(b) The Council shall develop and recommend to the President policies, mechanisms and procedures to achieve and maintain stability of prices and costs in a growing economy. To this end it shall consult with representatives of agriculture, industry, labor, State and local governments, consumers and the public, through the National Commission on Productivity and otherwise.

(c) In all of its actions the Council shall be guided by the need to maintain consistency of price and wage policies with fiscal, monetary, international, and other economic policies of the United States.

(d) The Council shall inform the public, agriculture, industry, and labor concerning the need for controlling inflation and shall encourage and promote voluntary action to that end.

Sec. 4. (a) The Council, in carrying out the provisions of this Order, may continue to (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemptions, (iii) issue regulations and orders, (iv) provide for the establishment of committees and other comparable groups, and (v) take such other actions as it determines to be necessary and appropriate to carry out the purposes of this Order. More particularly, the Council, working through appropriate delegations to the Chairman of the Pay Board and the Chairman of the Price Commission, may (1) notwithstanding the provisions of subsection (a) of section 1 of this Order prescribe base periods for determining maximum levels for prices, rents, wages, and salaries other than the base period specified in subsection (a) of section 1 of this Order, and (2) otherwise increase or decrease, subject to section 202 of the Economic Stabilization Act of 1970, as amended, the maximum levels for prices, rents, wages, and salaries prescribed by subsection (a) of section 1 of this Order.

(b) The Council may redelegate to any agency, instrumentality, or official of the United States any authority under this Order, and may, in administering this Order, utilize the services of any other agencies, Federal or State, as may be available and appropriate.

(c) On request of the Chairman of the Council, each executive department or agency is authorized and directed, consistent with law, to furnish the Council with any available information which the Council may require in the performance of its functions.

Sec. 5. The Council may require the maintenance of appropriate records or other evidence which are necessary in carrying out the provisions of this Order and may require any person to maintain and produce for examination such records or other evidence in such form as it shall require, concerning prices, rents, wages, and salaries and all related matters. The Council may make such exemptions from any requirement otherwise imposed as are consistent with the purposes

of this Order. Any type of record or evidence required under regulations issued under this Order shall be retained for such period as the Council may prescribe.

Sec. 6. The expenses of the Council shall be paid from such funds of the Department of the Treasury or otherwise as may be available therefor.

Sec. 7. (a) There is hereby established a "Pay Board" (hereinafter referred to as the Board).

(b) The Board shall be composed of fifteen members. The members shall be appointed by the President and shall include five labor representatives, five business representatives, and five representatives of the general public. The members of the Board shall serve at the pleasure of the President and the President shall designate one of the members representing the public to serve as Chairman. The Chairman shall serve full time and be an official of the United States. The Chairman shall designate an Executive Director of the Board who shall serve under the direction of the Chairman of the Board and perform such duties as the Chairman may specify.

(c) The Board shall perform such functions with respect to the stabilization of wages and salaries as the Council delegates to the Board. The Chairman of the Board shall perform such functions with respect to the stabilization of wages and salaries as the Council may delegate to him and, in performing those functions shall exercise such authority, including the development and establishment of criteria for the stabilization of wages and salaries which shall be applied in the administration of this Order, as may be delegated to him by the Council.

Sec. 8. (a) There is hereby established a "Price Commission" (hereinafter referred to as the Commission).

(b) The Commission shall be composed of seven members. The members shall be appointed by the President and shall be representative of the general public. The Members of the Commission shall serve at the pleasure of the President, and the President shall designate one of the members to serve as Chairman. The Chairman shall serve full time and be an official of the United States. The Chairman shall designate an Executive Director of the Commission who shall serve under the direction of the Chairman of the Commission, and perform such duties as the Chairman may specify.

(c) The Commission shall perform such functions with respect to the stabilization of prices and rents as the Council delegates to the Commission. The Chairman of the Commission shall perform such functions with respect to the stabilization of prices and rents as the Council may delegate to him and, in performing these functions, shall exercise such authority, including the development and establishment of criteria for the stabilization of prices and rents which shall be applied in the administration of this Order, as may be delegated to him by the Council.

Sec. 9. (a) There is hereby established a Committee on Interest and Dividends. The Committee shall be composed of the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Chairman of the Federal Deposit Insurance Corporation, the Chairman of the Federal Home Loan Bank Board, and such others as the President may, from time to time, designate. The Chairman of the Board of Governors of the Federal Reserve System shall serve as Chairman of the Committee.

(b) This Committee shall, subject to review by the Council, formulate and execute a program for obtaining voluntary restraints on interest rates and dividends.

Sec. 10. (a) There is hereby established a Committee on the Health Services Industry. This Committee shall be composed of such members as the President may from time to time appoint. The members shall be generally representative of medical professions and related occupations, hospitals, and the insurance industry, other supporting industries, consumer interests, and the public. The President shall designate the Chairman of the Committee.

(b) This Committee shall provide advice concerning special considerations that tend to contribute to inflation in the health services industry. This Committee shall also assist the Board and Commission in the performance of their functions by making technical analyses of specific matters referred to it by the Board or Commission.

Sec. 11 (a) There is hereby established a Committee on State and Local Government Cooperation. The Committee shall be composed of such representatives of State and local governments and subdivisions thereof, representatives of State and local employees, and such others as the President may, from time

to time, appoint. The President shall designate the Chairman of the Committee.

(b) This Committee shall provide advice concerning special considerations involved in the stabilization of prices, rents, wages, and salaries pursuant to this Order as they relate to State and local government, and subdivisions and employees thereof. This Committee shall also assist the Board and Commission in the performance of their functions by making technical analyses of specific matters referred to it by the Board or Commission.

Sec. 12. Upon request of the Chairman of the Council, Federal departments and agencies shall provide such assistance in carrying out the provisions of this Order as is permitted by law.

Sec. 13. All orders, regulations, circulars, or other directives issued and all other actions taken pursuant to Executive Order No. 11615, as amended, are hereby confirmed and ratified, and shall remain in full force and effect, as if issued under this Order, unless and until altered, amended, or revoked by the Council or by such competent authority as the Council may specify.

Sec. 14. (a) The Construction Industry Stabilization Committee established by Executive Order No. 11588 of March 29, 1971, and the craft dispute boards authorized by section 2 of that Order, are hereby continued.

(b) The Chairman of the Pay Board, established by section 7 of this Order, shall henceforth perform all functions vested in the Secretary of Labor by Executive Order No. 11588, with respect to (1) the certification of determinations that a proposed wage or salary increase is not acceptable; (2) the approval of rules and regulations issued by the Construction Industry Stabilization Committee, and (3) the issuance of rules and regulations.

(c) Subsection (d) of section 5 and section 6 of Executive Order No. 11588,¹⁸ are hereby revoked.

(d) Subsections (a) and (c) of this section are effective immediately. Subsection (b) of this section shall be effective on the day the Chairman of the Pay Board gives notice that the Pay Board is operational.

Sec. 15. (a) Whoever willfully violates this Order or any order or regulation issued under authority of this Order shall be fined not more than \$5,000 for each such violation.

(b) The Council may in its discretion request the Department of Justice to bring actions for injunctions authorized under Section 205 of the Economic Stabilization Act of 1970, as amended, whenever it appears to the Council that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order issued pursuant to this Order.

Sec. 16. Executive Order No. 11615 of August 15, 1971,¹⁹ and Executive Order No. 11617 of September 2, 1971,²⁰ are hereby superseded.

RICHARD NIXON.

THE WHITE HOUSE,
October 15, 1971.

No. 11640

January 27, 1972, 37 F.R. 1213

FURTHER PROVIDING FOR THE STABILIZATION OF THE ECONOMY

On August 15, 1971, I issued Executive Order No. 11615³ providing for the stabilization of prices, rents, wages, and salaries, for a period of 90 days from the date of that Order. That Order also established the Cost of Living Council and charged it with the primary responsibility for administering the stabilization program, and for recommending to me additional policies and mechanisms to permit an orderly transition from the 90-day general prices, rents, wages, and salaries freeze imposed by Executive Order No. 11615 to a more flexible and selective system of economic restraints.

Subsequently, I received recommendations from the Cost of Living Council, and determined that the intent of the Economic Stabilization Act of 1970 (P.L. 91-379; 84 Stat. 799), as amended,³ could more effectively be carried out and the goals I specified in my speech to the Nation on October 7, 1971, could more effectively be achieved, on and after October 15, 1971 by substituting Executive

³ 12 U.S.C.A. § 1904 note.

¹⁸ 1971 U.S. Code Cong. & Adm. News, p. 2540.

¹⁹ 1971 U.S. Code Cong. & Adm. News, p. 2575.

²⁰ 1971 U.S. Code Cong. & Adm. News, p. 2580.

Order No. 11627³ for Executive Order No. 11615, as amended. Notwithstanding this substitution, the findings which I made in the preamble of Executive Order No. 11615 of August 15, 1971, were, after careful reconsideration, reaffirmed.

On December 22, 1971, I signed the Economic Stabilization Act Amendments of 1971 (P.L. 92-210: 85 Stat. 743)³ into law. To reflect the changes made by such Amendments in the Economic Stabilization Act of 1970 and to reaffirm the existing delegation of authority to the Council, this Order is substituted for Executive Order No. 11627, as amended. I hereby reaffirm the goals I specified in my speech to the Nation of October 7, 1971, and the findings which I made in the preamble of Executive Order No. 11615 of August 15, 1971.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970, as amended, it is hereby ordered as follows:

Section 1. (a) The Pay Board and Price Commission established by sections 7 and 8 of Executive Order No. 11627 of October 15, 1971, are hereby continued and shall act as agencies of the United States, and the Chairman of each of these bodies, acting in accordance with the majority vote of its members, shall, pursuant to the goals established by the Cost of Living Council, take such steps as may be necessary, and authorized by or pursuant to this Order, to stabilize prices, rents, wages, and salaries. Subject to action already taken under Executive order No. 11627 and pending action under this Order, and except as otherwise provided in section 203 of the Economic Stabilization Act of 1970, as amended, Executive Order No. 11639 of January 11, 1972, and the President's memorandum concerning administrative pay adjustments of January 11, 1972, prices, rents, wages, and salaries are stabilized effective as of August 16, 1971, at levels not greater than the highest of those pertaining to a substantial volume of actual transactions by each individual, business, firm, or other entity of any kind during the 30-day period ending August 14, 1971, for like or similar commodities or services. If no transactions occurred in that period, the ceiling will be the highest price, rent, salary, or wage in the nearest preceding 30-day period in which transactions did occur. No person shall charge, assess, or receive, or knowingly pay or offer to pay, directly or indirectly, in any transaction, prices or rents in any form higher than those permitted hereunder, and no person shall, directly or indirectly, pay or agree to pay, in any transaction, wages or salaries in any form, or to use any means to obtain payment of wages and salaries in any form, higher than those permitted hereunder, whether by retroactive increase or otherwise.

(b) Each person engaged in the business of selling or providing commodities or services shall maintain available for public inspection a record of the highest prices or rents charged for such or similar commodities or services during the 30-day period ending August 14, 1971.

(c) The provisions of sections 1 and 2 of this Order shall not apply to the prices charged for raw agricultural products.

Sec. 2. (a) The Cost of Living Council (hereinafter referred to as the Council), established by section 2 of Executive Order No. 11615 of August 15, 1971, is hereby continued and shall continue to act as an agency of the United States.

(b) The Council shall be composed of the following members: The Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Housing and Urban Development, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Director of the Office of Emergency Preparedness, the Special Assistant to the President for Consumer Affairs, and such others as the President may, from time to time, designate. The Secretary of the Treasury shall serve as Chairman of the Council and the Chairman of the Council of Economic Advisers shall serve as Vice Chairman. The Chairman of the Board of Governors of the Federal Reserve System shall serve as adviser to the Council.

(c) There shall be a Director of the Cost of Living Council who shall be appointed by the President, be a member of the Council, be a full-time official of the United States, be the Council's Chief Executive Officer, and shall be compensated at the rate prescribed for level III of the Executive Schedule by Section 5314 of Title 5 of the United States Code.

³ See footnote on p. 235.

Sec. 3 (a) Except as otherwise provided herein, all of the powers and duties conferred upon the President by the Economic Stabilization Act of 1970, as amended, shall continue to be delegated to the Council, including, without limitation, the power to stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth and the power and duty to make the determinations and take the actions required or permitted by the Act.

(b) The Council shall develop and recommend to the President policies, mechanisms and procedures to achieve and maintain stability of prices and costs in a growing economy. To this end it shall consult with representatives of agriculture, industry, labor, State and local governments, consumers and the public, through the National Commission on Productivity and otherwise.

(c) In all of its actions the Council shall be guided by the need to maintain consistency of price and wage policies with fiscal, monetary, international, and other economic policies of the United States.

(d) The Council shall inform the public, agriculture, industry, and labor concerning the need for controlling inflation and shall encourage and promote voluntary action to that end.

(e) The Council shall prepare the section of the Economic Report and the quarterly reports required by section 216 of the Economic Stabilization Act of 1970, as amended.

Sec. 4. (a) The Council, in carrying out the provisions of this Order, may continue to (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemptions, (iii) issue regulations and orders, (iv) provide for the establishment of committees and other comparable groups, and (v) take such other actions as it determines to be necessary or appropriate to carry out the purposes of this Order. More particularly, the Council, working through appropriate delegations to the Chairman of the Pay Board and the Chairman of the Price Commission, may (1) notwithstanding the provisions of subsection (a) of section 1 of this Order, prescribe base periods for determining maximum levels for prices, rents, wages, and salaries other than the base period specified in subsection (a) of section 1 of this Order, and (2) otherwise increase or decrease, subject to section 203 of the Economic Stabilization Act of 1970, as amended, the maximum levels for prices, rents, wages, and salaries prescribed by subsection (a) of section 1 of this Order.

(b) The Council may redelegate to any agency, instrumentality, or official of the United States any authority under this Order, and may, in administering this Order, utilize the services of any other agencies, Federal or State, as may be available and appropriate.

(c) On request of the Chairman of the Council, each executive department or agency is authorized and directed, consistent with law, to furnish the Council, with any available information which the Council may require in the performance of its functions.

Sec. 5. The Council may require the maintenance of appropriate records or other evidence which are necessary in carrying out the provisions of this Order, and may require any person to maintain and produce for examination such records or other evidence, in such form as it shall require, concerning prices, rents, wages, and salaries and all related matters. The Council may make such exemptions or exceptions from any requirement otherwise imposed as are consistent with the purposes of this Order. Any type of record or evidence required under regulations issued under this Order shall be retained for such period as the Council may prescribe.

Sec. 6. The expenses of the Council shall be paid from such funds as may be available therefore, under legislation, from the Department of the Treasury or otherwise.

Sec. 7. (a) There is hereby continued the "Pay Board" (hereinafter referred to as the Board).

(b) The Board shall be composed of fifteen members. The members shall be appointed by the President by and with the advice and consent of the Senate; except that the foregoing requirement with respect to Senate confirmation does not apply to any member of the Board (other than the Chairman) who was serving, pursuant to appointment by the President, on December 22, 1971, and who continues to serve pursuant to such appointment, after such time. The Board shall include five labor representatives, five business representatives, and five representatives of the general public. The members of the Board shall

serve at the pleasure of the President, and the President shall designate one of the members representing the public to serve as Chairman. Any person serving in the Office of Chairman on December 22, 1971, may continue to serve in such capacity on an interim basis without regard to the requirement with respect to Senate confirmation until the expiration of 60 days after December 22, 1971. The Chairman shall serve full-time and be an official of the United States and shall be compensated at the rate prescribed for level III of the Executive Schedule by Section 5314 of Title 5 of the United States Code. Each other member shall receive compensation at a rate equal to the per diem equivalent of the rate prescribed for Level IV of the Executive Schedule by Section 5314 of Title 5 of the United States Code, when actually engaged in the performance of his duties as such member. The Chairman shall designate an Executive Director of the Board who shall be compensated at the rate prescribed for Level V of the Executive Schedule by Section 5316 of Title 5 of the United States Code, and who shall serve under the direction of the Chairman of the Board and perform such duties as the Chairman may specify. The Board shall conduct its proceedings in such manner as will be conducive to the proper dispatch of its business and to the ends of justice.

(c) The Board shall perform such functions with respect to the stabilization of wages and salaries as the Council delegates to the Board. Legal authority shall be in the Chairman of the Board, who shall act only in accordance with the majority vote of its members, shall perform such functions with respect to the stabilization of wages and salaries as the Council may delegate to him, including the development and establishment of criteria and standards for the stabilization of wages and salaries which shall be applied in the administration of this Order, as may be delegated to him by the Council.

Sec. 8. (a) There is hereby continued the "Price Commission" (hereinafter referred to as the Commission).

(b) The Commission shall be composed of seven members. The members shall be representative of the general public and shall be appointed by the President by and with the advice and consent of the Senate except that the foregoing requirement with respect to Senate confirmation does not apply to any member of the Commission (other than the Chairman) who was serving, pursuant to appointment by the President, on December 22, 1971, and who continues to serve pursuant to such appointment after such time. The members of the Commission shall serve at the pleasure of the President, and the President shall designate one of the members to serve as Chairman. Any person serving in the Office of Chairman on December 22, 1971, may continue to serve in such capacity on an interim basis without regard to the requirement with respect to Senate confirmation until the expiration of 60 days after December 22, 1971. The Chairman shall serve full-time and be an official of the United States and shall be compensated at the rate prescribed for Level III of the Executive Schedule by Section 5314 of Title 5 of the United States Code. Each other member shall receive compensation at a rate equal to the per diem equivalent of the rate prescribed for Level IV of the Executive Schedule by Section 5315 of Title 5 of the United States Code, when actually engaged in the performance of his duties as such member. The Chairman shall designate an Executive Director of the Board who shall be compensated at the rate prescribed for Level V of the Executive Schedule by Section 5316 of Title 5 of the United States Code, and who shall serve under the direction of the Chairman of the Commission and perform such duties as the Chairman may specify. The Commission shall conduct its proceedings in such manner as will be conducive to the proper dispatch of its business and to the ends of justice.

(c) The Commission shall perform such functions with respect to the stabilization of prices and rents as the Council delegates to the Commission. The Chairman of the Commission, who shall act only in accordance with the majority vote of its members, shall perform such functions with respect to the stabilization of prices and rents as the Council may delegate to him, including the development and establishment of criteria and standards for the stabilization of prices and rents which shall be applied in the administration of this Order, as may be delegated to him by the Council.

Sec. 9. (a) The Committee on Interest and Dividends established by section 9 of Executive Order No. 11627 is hereby continued. The Committee shall be composed of the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Chairman of the Federal Deposit Insurance Corporation, the Chairman of the Federal Home Loan Bank Board,

and such others as the President may, from time to time, designate. The Chairman of the Board of Governors of the Federal Reserve System shall serve as Chairman of the Committee.

(b) This Committee shall, subject to review by the Council, formulate and execute a program for obtaining voluntary restraints on interest rates and dividends.

Sec. 10. (a) The Committee on the Health Services Industry established by section 10 of Executive Order No. 11627 is hereby continued. The Committee shall be composed of such members as the President may from time to time appoint. The members shall be generally representative of medical professions and related occupations, hospitals, the insurance industry, other supporting industries, consumer interests, and the public. The President shall designate the Chairman of the Committee.

(b) This Committee shall provide advice concerning special considerations that tend to contribute to inflation in the health services industry. This Committee shall also assist the Board and Commission in the performance of their functions by making technical analyses of specific matters referred to it by the Board or Commission.

Sec. 11. (a) The Committee on State and Local Government Cooperation established by section 11 of Executive Order No. 11627 is hereby continued. The Committee shall be composed of such representatives of State and local governments and subdivisions thereof, representatives of State and local employees, and such others as the President may, from time to time, appoint. The President shall designate the Chairman of the Committee.

(b) This Committee shall provide advice concerning special considerations involved in the stabilization of prices, rents, wages, and salaries pursuant to this Order as they relate to State and local governments, and subdivisions and employees thereof. This Committee shall also assist the Board and Commission in the performance of their functions by making technical analyses of specific matters referred to it by the Board or Commission.

Sec. 12. (a) The Rent Advisory Board established by section 11A of Executive Order No. 11627, as amended, is hereby continued. The Rent Advisory Board shall be composed of such members as the President may from time to time appoint. The President shall designate the Chairman of the Rent Advisory Board.

(b) The Rent Advisory Board shall provide advice concerning special considerations involved in the stabilization of rents. It shall also assist the Commission in the performance of its functions by making technical analyses of specific matters referred to it by the Commission.

Sec. 13. On request of the Chairman of the Council, Federal departments and agencies shall provide such assistance in carrying out the provisions of this Order as is permitted by law.

Sec. 14. All orders, regulations, circulars, or other directives issued and all other actions taken pursuant to Executive Order No. 11615, as amended, and Executive Order No. 11627, as amended, and in effect on the date of this Order, are hereby confirmed and ratified, and shall remain in full force and effect, as if issued under this Order, unless and until altered, amended, or revoked by the Council or by such competent authority as the Council may specify.

Sec. 15. (a) The Construction Industry Stabilization Committee established by section 1 of Executive Order No. 11588 of March 29, 1971, and the craft dispute boards authorized by section 2 of that Order, are hereby continued, except as modified by the provisions of the Economic Stabilization Act of 1970, as amended.

(b) The Chairman of the Pay Board, acting in accordance with the majority vote of its members, shall continue to perform all functions vested in the Secretary of Labor by Executive Order No. 11588, with respect to (1) the certification of determinations that a proposed wage or salary increase is not acceptable pursuant to section 5 of that Order, (2) the approval of rules and regulations issued by the Construction Industry Stabilization Committee pursuant to section 10 of that Order, and (3) the issuance of rules and regulations pursuant to section 10 of that Order.

(c) The revocation of subsection (d) of section 5 and section 6 of Executive Order No. 11588 contained in subsection (c) of section 14 of Executive Order No. 11627 shall remain in effect.

(d) Section 8 of Executive Order No. 11588 is hereby revoked and the Inter-agency Committee on Construction established by that section is therefore abolished.

Sec. 16. (a) Whoever willfully violates this Order or any order or regulation issued under authority of this Order shall be subject to a fine of not more than \$5,000 for each such violation. Whoever violates this Order or any order or regulation issued under authority of this Order shall be subject to a civil penalty of not more than \$2,500 for each such violation.

(b) The Council may in its discretion request the Department of Justice to bring actions for injunctions authorized under Section 209 of the Economic Stabilization Act of 1970, as amended, whenever it appears to the Council that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order issued pursuant to this Order. The relief sought may include a mandatory injunction commanding any person to comply with any such order or regulation and restitution of moneys received in violation of any such order or regulation.

(c) The Chairman of the Cost of Living Council, the Chairman of the Pay Board, the Chairman of the Price Commission, or the Secretary of the Treasury, respectively, or the duly authorized agent of any of them, shall have authority for any purpose related to the Economic Stabilization Act of 1970, as amended, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths, all in accordance with the provisions of Section 206 of the Economic Stabilization Act of 1970, as amended.

Sec. 17. Executive Order No. 11627 of October 15, 1971, Executive Order No. 11630 of October 30, 1971, Executive Order No. 11632 of November 22, 1971, are hereby superseded.

Sec. 18. This Order shall be effective as of December 22, 1971.

RICHARD NIXON.

THE WHITE HOUSE,
January 26 1972.

No. 11660

March 25, 1972, 37 F.R. 6175

AMENDMENT OF EXECUTIVE ORDER NO. 11640, FURTHER PROVIDING FOR THE
STABILIZATION OF THE ECONOMY

By virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970, as amended, it is hereby ordered as follows:

Section 1. Subsection (a) of section 1 of Executive Order No. 11640 of January 26, 1972,³⁰ is amended by inserting in lieu of the first sentence thereof the following:

"The Pay Board and Price Commission established by sections 7 and 8 of Executive Order No. 11627 of October 15, 1971, are hereby continued, except to the extent that the language prescribing the composition of the Pay Board and the Price Commission has been modified by sections 7(b) and 8(b) of this Order, as amended, and shall act as agencies of the United States. The Chairman of each of these bodies, acting in accordance with the majority vote of its members, shall, pursuant to the goals established by the Cost of Living Council, take such steps as may be necessary, and authorized by or pursuant to this Order, to stabilize prices, rents, wages, and salaries."

Sec. 2. Subsection (b) of section 7 of Executive Order No. 11640 is amended by inserting in lieu of the first four sentences thereof the following:

"The Board shall be composed of such members as the President has appointed or may, from time to time, appoint and who are serving pursuant to such appointment. Such members shall be appointed by and with the advice and consent of the Senate; except that the foregoing requirement with respect to Senate confirmation does not apply to any member of the Board who was serving pursuant to appointment by the President, on December 22, 1971, and who continues to serve pursuant to such appointment, after such time. The members of the Board shall serve at the pleasure of the President and one of the members designated by the President shall serve as Chairman."

³⁰ 1972 U.S. Code Cong. & Adm. News, p. 5496.

Sec. 3. (a) Subsection (b) of section 8 of Executive Order No. 11640 is amended by inserting in lieu of the first two sentences thereof the following:

"The Commission shall be composed of such members as the President has appointed or may, from time to time, appoint and who are serving pursuant to such appointment. Such members shall be appointed by and with the advice and consent of the Senate; except that the foregoing requirement with respect to Senate confirmation does not apply to any member of the Commission who was serving, pursuant to appointment by the President, on December 22, 1971, and who continues to serve pursuant to such appointment, after such time."

(b) The penultimate sentence of section 8(b) of Executive Order No. 11640 is amended by deleting "Executive Director of the Board" and inserting in lieu thereof "Executive Director of the Commission".

Sec. 4. All orders, regulations, circulars, or other directives issued and all other actions taken pursuant to Executive Order No. 11615, as amended, Executive Order No. 11627, as amended, and Executive Order No. 11640, as in effect on the date of this Order, are hereby confirmed and ratified, and shall remain in full force and effect, unless and until altered, amended, or revoked by competent authority.

RICHARD NIXON.

THE WHITE HOUSE,
March 23, 1972.

No. 11674

June 30, 1972, 37 F.R. 12913

AMENDING EXECUTIVE ORDER NO. 11640, AS AMENDED, FURTHER PROVIDING FOR
THE STABILIZATION OF THE ECONOMY

By virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970 (P.L. 92-210; 85 Stat. 743), as amended,⁵⁵ subsection (c) of Section 1 of Executive Order No. 11640 of January 26, 1972,⁵⁶ is amended to read as follows: "The authority conferred by or pursuant to this Order shall not extend to the prices charged for raw agricultural products until after the first sale thereof."

RICHARD NIXON.

THE WHITE HOUSE,
June 29, 1972.

No. 11695

January 12, 1973, 38 F.R. 1473

FURTHER PROVIDING FOR THE STABILIZATION OF THE ECONOMY

On August 15, 1971, I issued Executive Order 11615 establishing a freeze on prices, rents, wages and salaries for a period of 90 days from the date of that order and establishing the Cost of Living Council as the agency with primary responsibility for administering the Economic Stabilization Program.

Subsequently, I issued Executive Order 11627 which continued the Cost of Living Council and established a Pay Board and a Price Commission. Under the terms of that order, the Cost of Living Council established broad stabilization goals for the Nation and the Pay Board and Price Commission, acting through their respective Chairmen, prescribed specific standards, criteria and regulations and made rulings and decisions aimed at carrying out goals of the Economic Stabilization Program.

On December 22, 1971, I signed into law amendments to the Economic Stabilization Act of 1970. To reflect changes made by these amendments and to reaffirm the existing delegation of authority to the Cost of Living Council, I substituted Executive Order 11640.

As the result of efforts under the Economic Stabilization Program, by public officials and private citizens alike, the rate of inflation has been significantly reduced. However, in furtherance of the goals and for the reasons set forth in

⁵⁵ 12 U.S.C.A. § 1904 note.

⁵⁶ 12 U.S.C.A. § 1904 note.

my message to the Congress of this date, I have determined that to continue to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, all in the context of sound fiscal management and effective monetary policies, the Economic Stabilization Program should be continued, building upon the solid foundation of achievement accomplished in the past and redirecting our efforts to respond to the needs of the current year.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970, as amended, it is hereby ordered as follows:

Section 1. (a) The Cost of Living Council (hereinafter referred to as the "Council"), established by section 2 of the Executive Order 11615 of August 15, 1971, is hereby continued.

(b) The Council shall be composed of the following members: The Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Labor, the Secretary of Health, Education, and Welfare, the Secretary of Housing and Urban Development, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers, the Director of the Office of Emergency Preparedness, the Special Assistant to the President for Consumer Affairs and such others as the President may, from time to time, designate. The Secretary of the Treasury shall serve as Chairman of the Council and the Chairman of the Council of Economic Advisers shall serve as Vice Chairman. The Chairman of the Board of Governors of the Federal Reserve System shall serve as adviser to the Council.

(c) There shall be a Director of the Cost of Living Council who shall be appointed by the President, be a member of the Council, be a full-time official of the United States, be the Council's Chief Executive Officer, and be compensated at the rate prescribed for Level III of the Executive Schedule by section 5314 of Title 5 of the United States Code.

Sec. 2. (a) Except as otherwise provided in subsection (b) of this section, all the powers and duties conferred upon the President by the Economic Stabilization Act of 1970, as amended, are hereby delegated to the Chairman of the Council, including, without limitation, the power and duty to make the determinations and take the actions required or permitted by the Act.

(b) The authority conferred by or pursuant to this order shall not extend to the prices charged for raw agricultural products until after the first sale thereof.

(c) The Council shall develop and recommend to the President policies, mechanisms and procedures to achieve and maintain stability of prices and costs in a growing economy. To this end it shall consult with representatives of agriculture, industry, labor, State and local governments, consumers and the public, including the National Commission on Productivity.

(d) In all of its actions the Council shall be guided by the need to maintain consistency of price and wage policies with fiscal, monetary, international, and other economic policies of the United States.

(e) The Council shall inform the public, agriculture, industry, and labor concerning the need for controlling inflation and shall encourage and promote voluntary action to that end.

Sec. 3. (a) All orders, regulations, circulars, rulings, notices or other directives issued and all other actions taken by any agency pursuant to Executive Order 11588, as amended, Executive Order 11615, as amended, Executive Order 11627, as amended, and Executive Order 11640, as amended, and in effect on the date of this order are hereby confirmed and ratified, and shall remain in full force and effect as if issued under this order, unless or until altered, amended, or revoked by the Chairman or by such competent authority as the Chairman may specify, and shall be administered by the Chairman or by such competent authority as the Chairman may specify.

(b) The Chairman shall take such steps as are necessary to make appropriate disposition of actions in process under the Economic Stabilization Program to effect an orderly transfer of stabilization functions pursuant to this order.

(c) This order shall not operate to defeat any suit, action, prosecution, or administrative proceeding, whether heretofore or hereafter commenced, with respect to any right possessed, liability incurred, or offense committed prior to this date.

(d) Renegotiation provisions in price, rent, wage or salary contracts which are dependent for their operation on modification or termination of the Economic Stabilization Program are hereby declared inoperative as unreasonably inconsistent with the goals of the Economic Stabilization Program. Except to the extent

permitted pursuant to the provisions of section 4(a), this order shall not operate to permit:

(i) A retroactive increase in prices, rents, wages or salaries for goods or services sold or leased or work performed while the prices, rents, wages or salaries were subject to the rules of the Price Commission or the Pay Board, or

(ii) A prospective increase in prices, rents, wages or salaries under the terms of a contract subject to a Price Commission or Pay Board decision and order, except to the extent consistent with such decision and order.

Sec. 4. (a) The Chairman, in carrying out the provisions of this order, may continue to (i) prescribe definitions for any terms used herein, (ii) make exceptions or grant exemptions, (iii) issue regulations and orders, (iv) provide for the establishment of committees and other comparable groups, and (v) take such other actions as he determines to be necessary or appropriate to carry out the purposes of this order.

(b) The Chairman may redelegate to any agency, instrumentality, or official of the United States any authority under this order, and may, in administering this order, utilize the services of any other agency, Federal or State, as may be available or appropriate.

(c) On request of the Chairman, each executive department or agency is authorized and directed, consistent with law, to furnish the Council with any available information which the Council may require in the performance of its functions, and shall provide such other assistance in carrying out the provisions of this order as is permitted by law.

Sec. 5. (a) The Construction Industry Stabilization Committee (hereinafter referred to as the CISC) established by section 2 of Executive Order 11588 of March 29, 1971, is hereby continued and shall continue to act as an agency of the United States. The CISC shall perform such functions with respect to the stabilization of wages and salaries in the construction industry as the Chairman of the Council may delegate to it.

(b) The CISC shall be composed of twelve members. The CISC shall include four members representative of labor organizations in the construction industry, four members representative of employers in the construction industry, and four members representative of the public. The CISC shall conduct its proceedings in such manner as will be conducive to the proper dispatch of its business and to the ends of justice.

(c) The craft dispute boards (hereinafter referred to as "boards") established by associations of contractors and national and international unions under section 2 of Executive Order 11588 are hereby continued. Each board shall be composed of appropriate labor and management representatives. The boards shall perform such functions with respect to the stabilization of wages and salaries in the construction industry as the Chairman of the Council may prescribe.

(d) Upon a determination by a board or the CISC that a proposed wage or salary increase is not acceptable and certification of that determination by the Chairman of the Cost of Living Council the following actions shall be taken.

(i) In implementing the provisions of the Davis-Bacon Act of March 3, 1931 (46 Stat. 1494, as amended) and related statutes the provisions of which are dependent upon determinations by the Secretary of Labor under the Davis-Bacon Act, and including State statutes or laws requiring similar wage standards, the Secretary of Labor and all States shall not take into consideration any wage or salary increases in excess of that found to be acceptable in making determinations under that act and related statutes.

(ii) In order to assure that unacceptable wage rates shall not be utilized in Federal or federally-related construction, the heads of all Federal departments and agencies, subject to the direction and coordination of the Chairman of the Cost of Living Council:

(1) shall review all plans for construction and financial assistance for construction in localities in which wage or salary increases have been certified by the Chairman of the Cost of Living Council to be unacceptable and shall, on the basis of that review, determine whether such plans can be approved or continued; and

(2) shall review current and prospective construction contracts for Federal construction and for construction on projects receiving Federal financial assistance in the area affected by a certification by the Chairman of the Cost of Living Council and shall, on the basis of such review, determine whether such contracts can be awarded or continued.

Sec. 6. (a) There is hereby established the Cost of Living Council Committee on Health to be composed of the Director of the Council, who shall be its Chair-

man, the Vice Chairman of the Council, the Secretary of the Treasury, the Secretary of Health, Education, and Welfare, the Director of the Office of Management and Budget, and such others as the President may, from time to time, designate. The Committee shall review Government activities significantly influencing health care expenses and make recommendations to the Chairman of the Council concerning these matters.

(b) There is hereby established a Health Industry Advisory Committee. This Committee shall be composed of such members as the President may, from time to time, appoint. The President shall designate the Chairman of the Committee. The Committee shall provide advice to the Council on the operation of the Economic Stabilization Program in the health industry and other matters related to health care expenses.

Sec. 7. (a) There is hereby established the Cost of Living Council Committee on Food which shall be composed of the Chairman of the Council, who shall be its Chairman, the Vice Chairman of the Council, the Director of the Council, the Secretary of Agriculture, the Director of the Office of Management and Budget and such others as the President may, from time to time, designate. The Committee shall review Government activities significantly affecting food costs and prices and make recommendations to the Chairman of the Council concerning these matters.

(b) There is hereby established a Food Industry Advisory Committee. This Committee shall be composed of such members as the President may, from time to time, appoint. The President shall designate the Chairman of the Committee. The Committee shall provide advice to the Council on the operation of the Economic Stabilization Program in the food industry and other matters related to food costs and prices.

Sec. 8. There is hereby established a Labor-Management Advisory Committee. This Committee shall be composed of such members as the President may, from time to time, appoint. The Committee shall provide advice to the Chairman of the Council on methods for improving the collective bargaining process and for assuring wage and salary settlements consistent with gains in productivity and the goal of stemming the rate of inflation.

Sec. 9. The Committee on Interest and Dividends established by section 9 of Executive Order 11627 is hereby continued. The Committee shall be composed of the Chairman of the Board of Governors of the Federal Reserve System, the Secretary of the Treasury, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Chairman of the Federal Deposit Insurance Corporation, the Chairman of the Federal Home Loan Bank Board, and such others as the President may, from time to time, designate. The Chairman of the Board of Governors of the Federal Reserve System shall serve as Chairman of the Committee. This Committee shall, subject to review by the Council, formulate and execute a program for obtaining voluntary restraints on interest rates and dividends.

Sec. 10. (a) The Pay Board and Price Commission established by sections 7 and 8 of Executive Order 11627 are hereby abolished effective not more than 90 days from the date of this order or such earlier date as the Chairman of the Cost of Living Council may designate. The Board and the Commission during this transition period shall provide for winding up any outstanding matter involving them subject to the direction of the Chairman of the Council.

(b) The Committee on the Health Services Industry established by section 10 of Executive Order 11627 is hereby abolished.

(c) The Committee on State and Local Government Cooperation established by section 11 of Executive Order 11627 is hereby abolished.

(d) The Rent Advisory Board established by section 11A of Executive Order 11627, as amended, is hereby abolished.

(e) The Chairman of the Council shall make appropriate provision for the disposition of the records, property, personnel, and funds relating to the agencies and committees abolished by this section.

(f) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred pursuant to this section shall be so restricted by the Chairman of the Council as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly related, except as provided for by law or as required in the final disposition thereof pursuant to law.

Sec. 11. (a) Whoever willfully violates this order or any order or regulation continued or issued under authority of this order shall be subject to a fine of not

more than \$5,000 for each such violation. Whoever violates this order or any order or regulation continued or issued under authority of this order shall be subject to a civil penalty of not more than \$2,500 for each such violation.

(b) The Chairman of the Council may in his discretion request the Department of Justice to bring actions for injunctions authorized under section 209 of the Economic Stabilization Act of 1970, as amended, whenever it appears to him that any person has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order continued or issued pursuant to this order. The relief sought may include a mandatory injunction commanding any person to comply with any such order or regulation and restitution of monies received in violation of any such order or regulation.

(c) The Chairman of the Cost of Living Council, or his duly authorized agent, shall have authority for any purpose related to the Economic Stabilization Act of 1970, as amended, to sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths, all in accordance with the provisions of section 206 of the Economic Stabilization Act of 1970, as amended.

Sec. 12. Executive Order 11588 of March 29, 1971, Executive Order 11640 of January 26, 1972, Executive Order 11660 of March 25, 1972, and Executive Order 11674 of June 29, 1972, are hereby superseded.

RICHARD NIXON.

THE WHITE HOUSE,
January 11, 1973.

No. 11723

June 15, 1973, 38 F.R. 15763

FURTHER PROVIDING FOR THE STABILIZATION OF THE ECONOMY

On January 11, 1973 I issued Executive Order 11695 which provided for establishment of Phase III of the Economic Stabilization Program. On April 30, 1973 the Congress enacted, and I signed into law, amendments to the Economic Stabilization Act of 1970 which extended for one year, until April 30, 1974, the legislative authority for carrying out the Economic Stabilization Program.

During Phase III, labor and management have contributed to our stabilization efforts through responsible collective bargaining. The American people look to labor and management to continue their constructive and cooperative contributions. Price behavior under Phase III has not been satisfactory, however. I have therefore determined to impose a comprehensive freeze for a maximum period of 60 days on the prices of all commodities and services offered for sale except the prices charged for raw agricultural products. I have determined that this action is necessary to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade and protect the purchasing power of the dollar, all in the context of sound fiscal management and effective monetary policies.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970, as amended, it is hereby ordered as follows:

Section 1. Effective 9:00 p.m., e.s.t., June 13, 1973, no seller may charge to any class of purchaser and no purchaser may pay a price for any commodity or service which exceeds the freeze price charged for the same or a similar commodity or service in transactions with the same class of purchaser during the freeze base period. This order shall be effective for a maximum period of 60 days from the date hereof, until 11:59 p.m., e.s.t., August 12, 1973. It is not unlawful to charge or pay a price less than the freeze price and lower prices are encouraged.

Section 2. Each seller shall prepare a list of freeze prices for all commodities and services which he sells and shall maintain a copy of that list available for public inspection, during normal business hours, at each place of business where such commodities or services are offered for sale. In addition, the calculations and supporting data upon which the list is based shall be maintained by the seller at the location where the pricing decisions reflected on the list are ordinarily made and shall be made available on request to representatives of the Economic Stabilization Program.

Section 3. The provisions of this order shall not extend to the prices charged for raw agricultural products. The prices of processed agricultural products, however, are subject to the provisions of this order. For those agricultural prod-

ucts which are sold for ultimate consumption in their original unprocessed form, this provision applies after the first sale.

Section 4. The provisions of this order do not extend to (a) wages and salaries, which continue to be subject to the program established pursuant to Executive Order 11695, (b) interest and dividends, which continue to be subject to the program established by the Committee on Interest and Dividends and (c) rents which continue to be subject to controls only to the limited extent provided in Executive Order 11695.

Section 5. The Cost of Living Council shall develop and recommend to the President policies, mechanisms and procedures to achieve and maintain stability of prices and costs in a growing economy after the expiration of this freeze. To this end, it shall consult with representatives of agriculture, industry, labor, consumers and the public.

Section 6(a). Executive Order 11695 continues to remain in full force and effect and the authority conferred by and pursuant to this order shall be in addition to the authority conferred by or pursuant to Executive Order 11695 including authority to grant exceptions and exemptions under appropriate standards issued pursuant to regulations.

(b) All powers and duties delegated to the Chairman of the Cost of Living Council by Executive Order 11695 for the purpose of carrying out the provisions of that order are hereby delegated to the Chairman of the Cost of Living Council for the purpose of carrying out the provisions of this order.

Section 7. Whoever willfully violates this order or any order or regulation continued or issued under authority of this order shall be subject to a fine of not more than \$5,000 for each such violation. Whoever violates this order or any order or regulation continued or issued under authority of this order shall be subject to a civil penalty of not more than \$2,500 for each such violation.

Section 8. For purposes of this Executive Order, the following definitions apply: "Freeze price" means the highest price at or above which at least 10 percent of the commodities or services concerned were priced by the seller in transactions with the class of purchaser concerned during the freeze base period. In computing the freeze price, a seller may not exclude any temporary special sale, deal or allowance in effect during the freeze base period.

"Class of purchaser" means all those purchasers to whom a seller has charged a comparable price for comparable commodities or services during the freeze base period pursuant to customary price differentials between those purchasers and other purchasers.

"Freeze base period" means

(a) the period June 1 to June 8, 1973; or

(b) in the case of a seller who had no transactions during that period, the nearest preceding seven-day period in which he had a transaction.

"Transaction" means an arms length sale between unrelated persons and is considered to occur at the time of shipment in the case of commodities and the time of performance in the case of services.

RICHARD NIXON.

THE WHITE HOUSE,
June 13, 1973.

No. 11730

July 19, 1973, 38 F.R. 19345

FURTHER PROVIDING FOR THE STABILIZATION OF THE ECONOMY

On June 13, 1973, I ordered a freeze for a maximum period of 60 days on the prices of all commodities and services offered for sale except the prices charged for raw agricultural products. At that time, I stated that the freeze period would be used to develop a new and more effective system of controls to follow the freeze. Planning for the Phase IV program has proceeded rapidly and I have, therefore, decided that the freeze on food, except for beef, should be removed and the more flexible controls substituted in a two-stage process in the food industry. The first stage will be effective at 4:00 p.m., e. s. t., July 18, 1973. The freeze in other sectors of the economy will continue through August 12, 1973. I am also directing the Cost of Living Council to publish for comment now, proposed plans for Phase IV controls in other sectors of the economy. I have determined that this action is necessary to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade and

protect the purchasing power of the dollar, all in the context of sound fiscal management and effective monetary policies.

NOW THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, particularly the Economic Stabilization Act of 1970, as amended, it is hereby ordered as follows:

Section 1. Executive Order 11723 establishing a freeze on prices effective 9:00 p.m., e. s. t., June 13, 1973, for a maximum period of 60 days is hereby superseded except as hereinafter provided. Under the provisions of Executive Order 11695, the freeze regulations issued by the Cost of Living Council, pursuant to the authority of Executive Order 11723 remain in effect except as the Chairman of the Cost of Living Council may modify them. The price freeze established by Executive Order 11723 remains in effect until 11:59 p. m., e. s. t., August 12, 1973, except to the extent the Chairman of the Cost of Living Council may modify it.

Section 2. All orders, regulations, circulars, rulings, notices or other directives issued and all other actions taken by any agency pursuant to Executive Order 11723, and in effect on the date of this order are hereby confirmed and ratified, and shall remain in full force and effect unless or until altered, amended, or revoked by the Chairman of the Cost of Living Council.

Section 3. This order shall not operate to defeat any suit, action, prosecution, or administrative proceeding, whether heretofore or hereafter commenced, with respect to any right possessed, liability incurred, or offense committed prior to this date.

Section 4. Executive Order 11695 continues to remain in full force and effect.

RICHARD NIXON.

THE WHITE HOUSE

[From the Economic Stabilization Program, August 10, 1973]
PHASE IV PROCEDURAL REGULATIONS

[From the Economic Stabilization Program, August 10, 1973]
 Phase IV Procedural Regulations

TITLE 6—ECONOMIC STABILIZATION

CHAPTER I—COST OF LIVING COUNCIL

PART 155—PHASE IV PRICE PROCEDURES

Part 155 establishes price procedures to be utilized in proceedings involving price matters before the Cost of Living Council and the Internal Revenue Service in Phase IV of the Economic Stabilization Program. In general, Part 155 embodies procedures previously utilized in earlier phases of the program and combines them into one part. The use of the term "Council" throughout the part encompasses actions by and appearances before both the Cost of Living Council and the Internal Revenue Service.

In general, this part provides that firms should file their submissions in duplicate with the key IRS District Office which serves the district in which their corporate headquarters are domiciled. Exceptions to this rule are insurers who file with the National Office of Internal Revenue Service, and institutional and noninstitutional providers of health services who file with the Cost of Living Council. Initial actions and reconsideration of such actions will be made by the Council or IRS in accordance with Cost of Living Council Order No. 37, 38 F.R. (August , 1973).

Subpart A of part 155 contains general provisions embodying, with only minor technical changes, Part 305 of the Price Commission regulations. Section 155.11, Instructions to applicants, was previously included in Part 401 of the Internal Revenue Service regulations in this Title.

Subpart B, Prenotifications, reports, interpretations and other matters, is new. It establishes procedures governing initial actions of the Council with respect to all filings required or permitted under Part 150 of this chapter except for requests for exceptions, exemptions and reclassifications. Subparts C, D and E deal with exceptions, exemptions and reclassifications, notices of probable violation and remedial orders, and generally parallel Phase II Price Commission and Cost of Living Council Procedures. Subpart F is a new subpart combining all requests for reconsideration of deci-

sions issued under Subparts B, C, D and E under a single procedure. Subpart G, which concerns compromise of civil penalties, sets forth procedures which are the same as those employed by the Price Commission during Phase II. Subparts H and I, which relate to petition and comment on rulemaking and published rulings, respectively, are again similar to Phase II rules.

Subpart J sets out the range of Council responses to a violation of the profit margin limitations established for Phase IV in Part 150. The provisions are essentially those provided in Phase II, with the exception of § 155.181 dealing with custom products. That section provides relief for a firm which exceeds its base period margin in a fiscal year during which it sells a custom product or service, and which does not qualify for the Special Rule of § 155.11(d)(iii). That Special Rule provides that charging a price for a custom product or service does not subject a firm to a profit margin limitation during its first fiscal year ending in Phase IV when the firm derives less than \$10 million or less than 1% of its sales or revenues for that fiscal year, whichever is greater, from the sale of custom products and custom services. When a firm does not qualify for this de minimis provision, and therefore is required to take remedial action under this subpart, Subpart J provides the following rules. Where no prices have been charged above base levels for noncustom products and noncustom services, only an amount that bears the same ratio to the total profit margin overage as sales of custom products and services bears to total sales must be disgorged. Where prices in excess of base levels have been charged with respect to noncustom products and services, and the profit margin overage exceeds the revenues derived from the price increases above base levels for noncustom products and services, a firm must disgorge the revenue derived from charging prices above base levels with respect to

noncustom products and services plus a portion of the remaining profit margin overage equal to the ratio that custom products and services sales bear to total sales; and if the profit margin overage is less than the revenues derived from price increases above base levels, the firm is required to disgorge the full amount of the profit margin overage.

The purpose of Subpart K is to add to the Phase IV regulations the "repurification" procedures that were available under Special Regulation No. 1 issued during Phase II. Under the "repurification" procedure, a firm which becomes subject to the profit margin limitation by virtue of having raised a price above the base level may elect to eliminate those price increases and the revenues derived therefrom and thus return to the position of a firm which has not raised prices to the level which triggers the profit margin limitation. The remission of revenues must be made in the following manner:

(1) If the ultimate consumers who purchased the goods and services prices above the "base level" are reasonably identifiable, refunds must first be made to them.

(2) To the extent that these ultimate consumers are not reasonably identifiable, revenues must be remitted in the form of future sales at prices below the base level of the same goods and services previously sold at prices above the base level.

However, in order to avoid a profit margin violation a firm which wishes to repurify must complete all action to remit revenues before the end of the fiscal year. This procedure is available to a firm which increases prices above the base level and completes action within the same fiscal year. It also is available to a firm which raises a price or prices above the base level in a previous fiscal year (without exceeding its base period profit margin for that fiscal year) and which continues to charge the increased price or prices in an ensuing

fiscal year. To avoid the profit margin limitation in the ensuing fiscal year, the firm must return prices at least to the base levels and take appropriate steps to remit revenues derived in that ensuing fiscal year from the price increases which were previously put into effect. In any event, a firm which completes the steps listed above becomes subject to the profit margin limitation once again if it subsequently charges a price in excess of the "base level."

Since Executive Order No. 11730 provides that Phase IV of the Economic Stabilization Program will begin on 11:59 p.m., e.s.t., August 12, 1973 and since the Phase IV substantive regulations, Part 150, will be effective on that date, it is essential that the procedures governing appearances before and proceedings by the Cost of Living Council also be effective on 11:59 p.m., e.s.t., August 12, 1973. Consequently, in order to give immediate guidance and information to the public with respect to Phase IV price procedures, the Council finds that publication in accordance with usual rulemaking procedures is impractical and that good cause exists for making these regulations effective in less than 30 days. Interested persons may submit written comments regarding these regulations. Communications should be addressed to the Office of General Counsel, Cost of Living Council, 2000 M Street N.W., Washington, D.C. 20508.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 F.R. 1473; E.O. 11730, 38 F.R. 19345; Cost of Living Council Order No. 14, 38 F.R. 1489.)

In consideration of the foregoing, Part 155 is added to Chapter I of Title 6 of the Code of Federal Regulations, effective 11:59 p.m., e.s.t., August 12, 1973.

Issued in Washington, D.C. on August 9, 1973.

JOHN T. DUNLOP,

Director, Cost of Living Council.

PART 155—PHASE IV PRICE PROCEDURES

SUBPART A—GENERAL PROVISIONS

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Appendix

[Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 F.R. 1473; E.O. 11730, 38 F.R. 19345; Cost of Living Council Order No. 14, 38 F.R. 1489]

SUBPART A—GENERAL PROVISIONS

§ 155.1 Purpose and scope.

(a) This part establishes procedures to be utilized in proceedings before the Cost of Living Council and the Internal Revenue Service relating to price stabilization matters under Part 150 of this chapter. The word "Council" used throughout this part encompasses actions by and appearances before both agencies in economic stabilization matters. Cost of Living Council Order No. 37, 38 F.R. (August , 1973) contains information relating to the division of stabilization functions between the Council and IRS. More specifically, this part contains procedures for:

- (1) Initial actions with respect to prenotification, reports, interpretations and other matters;
- (2) Initial action on requests for exceptions;
- (3) Initial actions with respect to requests for exemption and reclassification;
- (4) Issuance of notices of probable violation and remedial orders;
- (5) Requests for reconsideration;
- (6) Compromise of civil penalties;
- (7) Petition and comment on rulemaking;
- (8) Published rulings;
- (9) Profit margin limitations: Council actions; and
- (10) Profit margin repurification.

(b) Procedural rules contained in Parts 105, 130, 140, 305 and 401 of this title continue in effect for the purpose of disposing of matters subject to those parts.

(c) Nothing in this part extinguishes or otherwise modifies present [August 13, 1973] procedures utilized by the Council in pay matters.

(d) When any small business enterprise within the meaning of section 214(a) of the Economic Stabilization Act of 1970, as amended, files a request, application or appeal under the provisions of this part it will be accorded expedited handling by affording it priority on the dockets maintained by the Council for the orderly conduct of its business.

§ 155.2 Definitions.

As used in this part, except where the context indicates otherwise, the term:

"Act" means the Economic Stabilization Act of 1970, as amended.

"Act or transaction" shall include a series or combination of such acts or transactions.

"Adverse action" means an action issued by the Council which is contrary to the position asserted by the applicant.

"Council" means the Chairman of the Cost of Living Council established by Executive Order 11615 (3 CFR, 1971 Comp., p. 199) and continued under the provisions of Executive Order 11695, or his delegate (including IRS).

"District conferee" means a person designated by a district director to process and decide any request for reconsideration referred to in this part.

"District director" means a district director of the Internal Revenue Service or his delegate.

"District office" means a district director's office and such local offices within his district as a director may designate. "Key District office" means a district office specially designated by the Assistant Commissioner of Internal Revenue (Stabilization) to handle particular stabilization matters.

"Exception" means a waiver in a particular case of the requirements of any rule, regulation, or order, issued pursuant to the Act.

"Exemption" means a general waiver of the requirements of all rules, regulations, and orders issued pursuant to the Act.

"Firm" has the same meaning as in § 150.31 of this chapter.

"Hearing Officer" means a person appointed by the Director of the Cost of Living Council or his delegate to conduct a hearing.

"Information letter" means a statement issued by a district director which calls attention to a well-established interpretation or principle of the regulations or guidelines of the Cost of Living Council without applying it to a specific set of facts. An information letter may be issued when the nature of the request from the individual or the organization suggests that it is seeking general information or where the request does not meet all the requirements of § 155.11, and it is believed that such general information will assist the individual or organization.

"Interpretation" means a written statement issued by a district director in response to an inquiry by an individual or an organization, which applies to the particular facts involved the principles and precedents previously announced by the Cost of Living Council. Interpretations are issued only where a determination can be made on the

basis of established rules as set forth in the regulations and guidelines of the Cost of Living Council or by rulings or court decisions.

"IRS" means the Internal Revenue Service.

"National Office" means the Office of the Assistant Commissioner of Internal Revenue (Stabilization).

"Notice of probable violation" means a written statement issued to a person by the Cost of Living Council or the Internal Revenue Service setting forth one or more charges of alleged violation of the Economic Stabilization Program.

"Person" means any firm, individual, estate, trust, sole proprietorship, partnership, association, company, joint-venture, corporation, governmental unit or instrumentality thereof, or a charitable, educational or other institution; however, the term does not include a foreign government or instrumentality thereof or international organizations established by treaty or by agreement among participating governments.

"Person aggrieved" means a person with a substantial pecuniary interest which is adversely affected by an order or interpretation issued by the Council.

"Person with a substantial pecuniary interest" means a person who increased or seeks to increase a price.

"Practice before the Cost of Living Council or IRS" comprehends all matters connected with presentation to the Council or IRS or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Council or IRS relating to economic stabilization matters. Such presentations include the preparation and filing of necessary documents, correspondence with and communications to the Council or IRS, and the representation of a client at conferences, hearings, and meetings. Neither the appearance of an individual as a witness, nor the furnishing of information at the request of the Council or IRS or any of its officers or employees is considered practice before the Council or IRS.

"Price increase has the same meaning as in § 150.31 of this chapter.

"Regulation" means a regulation promulgated by the Director of the Cost of Living Council, or his delegate, which appears in Title 6, Code of Federal Regulations.

"Request for a determination" means a written inquiry by a person as to the application to him of

the regulations and guidelines promulgated by the Cost of Living Council in respect of a completed or proposed act or transaction. Thus, such a request may be a request for an interpretation or an application for an exception.

"Ruling" means an official interpretation by the General Counsel of the Cost of Living Council, published in the Federal Register, which applies the regulations and guidelines of the Cost of Living Council to a specific set of facts.

§ 155.3 Appearances before the Council or IRS.

(a) A person may take any action or make any appearance which is required or permitted by this title on his own behalf, or he may be represented by any natural person, age 21 years or older, whom he has designated to represent him. Such designation shall be in writing and signed by the person legally authorized to so designate and shall be filed with the Council or appropriate IRS office, as the case may be.

(b) Persons appearing before the Cost of Living Council or the Internal Revenue Service in economic stabilization matters may be barred therefrom for disreputable conduct which includes, but is not limited to the following:

- (1) Filing false or altered documents, affidavits, and other papers;
- (2) Making false or misleading representations either orally or in writing; or
- (3) Using intemperate or abusive language or engaging in disruptive conduct before the Council or IRS.

§ 155.4 Filing of documents.

(a) Unless otherwise expressly provided, a document required to be filed directly with the Council or directly with a key IRS District office or National IRS office under this title is considered filed when it has been received at the appropriate office. Documents received after regular business hours are deemed filed on the next regular business day.

(b) All documents filed with the Council or IRS must be filed in duplicate.

§ 155.5 Computation of time.

(a) In computing any period of time prescribed or allowed by this title for the performance of any act, the day of the act, event, or default on which

the designated period of time begins to run will not be counted.

(b) If the last day of the period falls on a Saturday, Sunday, or a Federal legal holiday, the period will be extended to the next day which is not a Saturday, Sunday, or a Federal legal holiday.

(c) If the period prescribed or allowed is 7 days or less, an intervening Saturday, Sunday, or Federal legal holiday will not be counted.

§ 155.6 Service.

(a) All documents required to be served under this title are to be served personally, by registered or certified mail, or by regular U.S. mail (this option available only for service by the Council or IRS) on the person specified in the regulations in this title.

(b) If a person is represented by a duly authorized representative, service on the representative shall constitute service on the person.

(c) A certificate of service shall be filed with the Council for each document served.

(d) Service by mail is complete upon mailing.

§ 155.7 Extension of time.

If an action is required to be taken within a prescribed time under this title, an extension of time will be granted only upon a showing of good cause.

§ 155.8 Subpenas; witness fees.

(a) The Director of the Council, his duly authorized agent, the General Counsel, or an IRS District director of a key IRS District Office may sign and issue subpoenas.

(b) A subpoena may require the attendance of witnesses and the production of relevant papers, books, and documents in the possession or under the control of the person served.

(c) A subpoena may be served by any person who is not a party and not less than 18 years of age.

(d) The original subpoena bearing a certificate of service shall be filed with the issuing officer.

(e) A witness to whom a subpoena has been issued pursuant to this section shall be paid the same fees and mileage as are paid witnesses in district courts of the United States. The witness fees and mileage shall be paid by the party at whose instance the subpoena was issued.

§ 155.9 Consolidations.

Upon the initiative of the Council, the Director of the Council or his delegate, a Hearing Officer, a District director or his delegate, or a District conferee, or in response to a party's motion, two or more requests for exception, exemption, reclassification, or other cases which involve substantially the same parties or issues which are closely related, may be consolidated if it is found that such consolidation will expedite the proceedings or otherwise assist the Council or IRS in carrying out their economic stabilization functions.

§ 155.10 Effective date of orders.

Any order issued by the Council under this title is effective, in accordance with its terms, unless and until it is stayed, modified, suspended, or revoked.

§ 155.11 Instructions to applicants.

(a) Each request for a determination must be submitted in writing to the appropriate district director and contain a complete statement of all relevant facts relating to the act or transactions. Such facts include names, addresses, and identifying numbers of all affected parties (if reasonably ascertainable); a full and precise statement of the business reasons for the act or transaction (where appropriate); and a carefully detailed description of the act or transaction. In addition, true copies of all contracts, agreements, leases, instruments, and other documents involved must be submitted with the request. However, relevant facts reflected in documents submitted must be included in the statement and not merely incorporated by reference, and must be accompanied by an analysis of their bearing on the issue or issues, specifying the pertinent provisions. The request must contain a statement whether, to the best of the knowledge of the applicant or his representative, the identical issue is being considered by any field office of the IRS (or other governmental agency) in connection with a possible violation of economic stabilization regulations or guidelines by the person who is the subject of the requested determination. The request must also contain a statement as to whether the applicant or his representative has previously requested a determination with respect to the subject matter of the requested determination from any office of the IRS.

or any other governmental agency, detailing the disposition of any such previous request, or has filed an application for an exception or an exemption. Where the request pertains to only one step of a larger integrated transaction, the facts, circumstances, etc., must be submitted with respect to the entire transaction. As documents and exhibits become a part of the file and cannot be returned, the original documents should not be submitted.

(b) If the applicant is contending for a particular determination, he must furnish an explanation of the grounds for his contentions, together with a statement of relevant authorities in support of his views. Even though the applicant is urging no particular determination with regard to an act or transaction, he must state his views as to the effect of economic stabilization regulations and guidelines upon the action and furnish a statement of relevant authorities to support such views.

(c) A request by or for an applicant must be signed by the applicant or his authorized representative. If the request is signed by a representative of the applicant, or if the representative is to appear before the Council or IRS in connection with the request he must be a person who complies with the appearance requirements of this part. Such representative must not be under disbarment or suspension to practice before the Internal Revenue Service or the Cost of Living Council. Form S-68, Power of Attorney, must be used with regard to determinations requested pursuant to this section.

(d) Any request for a determination which does not comply with all the provisions of this section will be acknowledged and the requirements which have not been met will be pointed out.

(e) An applicant or his representative who desires an oral discussion of the issue or issues involved should indicate such desire in writing when filing the request or soon thereafter in order that a conference or hearing, if granted, may be arranged at that stage of consideration when it will be most helpful.

(f) It is the practice of the IRS to process requests for determinations in regular order and as expeditiously as possible. Compliance with a request for consideration of a particular matter ahead of its regular order, or by a specified time, tends to delay the disposition of other matters. Requests for processing ahead of the regular order, made in writing in a separate letter submitted with

the request or subsequent thereto and showing clear need for such treatment will be given consideration as the particular circumstances warrant. However, no assurance can be given that any request for determination will be processed by the time requested. For example, the scheduling of a closing date for transaction or a meeting of the board of directors or shareholders of a corporation without due regard to the time it may take to obtain such a determination will not be deemed sufficient reason for handling a request ahead of its regular order. Neither will the possible effect of fluctuation in the market price of goods or commodities on a transaction be deemed sufficient reason for handling a request out of order. Requests by telegram will be treated in the same manner as requests by letter. Determinations ordinarily will not be issued by telegram.

(g) A request for an interpretation which includes, or could be construed to include, an application for an exception or exemption will nonetheless be treated solely as a request for an interpretation, as appropriate, and processed as such.

SUBPART B—PRENOTIFICATIONS, REPORTS, INTERPRETATIONS, AND OTHER MATTERS

§ 155.21 Purpose and scope.

(a) This subpart establishes the procedures of the Council governing initial actions with respect to all filings required or permitted under the provisions of Part 150 of this chapter except for requests for exceptions which are governed by subpart C of this part and requests for exemption or reclassification which are governed by subpart D of this part. All papers filed must conform to the requirements set forth in part 150 and any filing instructions which accompany the prescribed forms.

(b) Except as provided in paragraphs (c) and (d), all firms making initial filings with respect to the following matters shall file their papers with the key IRS District Office which serves the district in which their corporate headquarters are domiciled:

(1) Prenotifications and reports filed pursuant to subparts H, K, L, N, or P of part 150;

(2) Applications for modification of prenotification requirements pursuant to § 150.151(b)(2)(iv);

(3) Applications for volatile pricing authorizations pursuant to § 150.156;

(4) Reports supporting loss or low profit firm pricing pursuant to § 150.201.

(5) Reports supporting minimum profit margin treatment pursuant to § 150.202;

(6) Merchandise pricing plans pursuant to § 150.306; and

(7) Requests for interpretation

(c) Insurers subject to subpart M of part 150 of this chapter shall make all filings pursuant to that subpart and shall file requests for interpretation with the Internal Revenue Service, Insurance Group (Stabilization), P.O. Box 995, Washington, D.C. 20044.

(d) Institutional and noninstitutional providers of health services subject to subpart O of Part 150 of this chapter shall make all filings pursuant to that subpart and shall file requests for interpretation with the Cost of Living Council, 2000 M Street, N.W., Washington, D.C. 20508.

(e) Initial actions on filings made pursuant to this subpart may be made by the Council or IRS, as appropriate, in accordance with Cost of Living Council Order No. 37, 38 F.R. — (August —, 1973).

§ 155.22 Initial actions by the Council.

(a) In those cases in which a document is filed with the Council and the applicable provision of part 150 provides that a proposed action may be taken unless the Council takes affirmative action to suspend, modify, defer, or disapprove the proposed action, the Council may make a decision and issue an order together with a statement of the grounds therefor to suspend, modify, defer, or disapprove the proposed action pursuant to the applicable provision of part 150.

(b) In those cases in which a document is filed with the Council and the applicable provision of part 150 provides that a proposed action may not be taken unless the Council approves, the Council will make a decision and issue an order together with a statement of the grounds therefor.

(c) Within 60 days after it receives a firm's merchandise pricing plan pursuant to § 150.306, the Council will review the plan and (1) approve it or (2) take the action provided for in § 150.308.

(d) The Council will issue interpretations in response to requests for interpretation filed pursuant to § 155.21 of this subpart.

(e) The Council will advise the recipient of an order or interpretation issued under this section which is adverse to the recipient that he may seek reconsideration under subpart F.

§ 155.23 Requests for Reconsideration.

Any person aggrieved by an initial action of the Council under this subpart may request reconsideration pursuant to subpart F. The Council will not consider that a person appearing before the Council has exhausted his administrative remedies until he has filed a request for reconsideration under subpart F and final action has been taken by the Council under §§ 155.106 through 155.108.

SUBPART C—EXCEPTIONS

§ 155.41 Purpose and scope.

Exceptions from the provisions of Part 150 of this title may be granted for the purpose of preventing or correcting a serious hardship or gross inequity.

(a) All persons requesting exceptions shall file their applications with the key IRS District Office which serves the district in which their corporate headquarters are domiciled, except that persons who are: (1) Insurers subject to subpart M of part 150 of this chapter, shall file with the Internal Revenue Service, Insurance Group (Stabilization), P.O. Box 995, Washington, D.C. 20044 and (2) Institutional and noninstitutional providers of health services subject to subpart O of Part 150 of this chapter, shall file with the Cost of Living Council, 2000 "M" Street, N.W., Washington, D.C. 20508. All requests for exception, wherever filed, must conform to the requirements set out in § 155.11 of this part.

(b) Initial actions on requests for exception may be made by the Council or IRS, as appropriate, in accordance with Cost of Living Council No. 37, 38 F.R. — (August —, 1973).

(c) This subpart establishes the rules of the Council governing the disposition of requests for exceptions.

§ 155.42 Initial action on request for exception.

After considering the record, the Council will make a decision and issue an appropriate order:

(a) When the Council grants an exception it will serve upon the applicant a copy of its order.

(b) When the Council denies an exception in whole or in part, it will serve upon the appellant a copy of its order, which will contain a statement of the grounds for denial, and advise the applicant that he may request reconsideration pursuant to subpart F of this part.

§ 155.43 Requests for reconsideration.

Any person aggrieved by an initial action of the Council under this subpart may request reconsideration pursuant to subpart F of this part. The Council will not consider that a person appearing before the Council has exhausted his administrative remedies until he has filed a request for reconsideration under subpart F and final action has been taken by the Council under §§ 155.106 through 155.108.

SUBPART D—EXEMPTIONS AND RECLASSIFICATIONS

§ 155.61 Purpose and scope.

(a) All requests for exemption, or reclassification with respect to prenotification or reporting requirements must be filed with the Cost of Living Council, 2000 M Street, N.W., Washington, D.C. 20508.

(b) This subpart establishes the rules of practice of the Council governing initial action on requests for exemption or reclassification.

§ 155.62 Initial action by Council.

After considering the record, the Council will make a decision and issue an order:

(a) When the Council grants an exemption or reclassification, it will serve upon the appellant a copy of its order.

(b) When the Council denies an exemption or reclassification, in whole or in part, it will serve upon the appellant a copy of its order, which will contain a statement of the grounds for denial, and advise the applicant that he may request reconsideration pursuant to Subpart F of this part.

§ 155.63 Requests for reconsideration.

Any person aggrieved by an initial action of the Council under this subpart may request reconsideration pursuant to subpart F of this part. The Council will not consider that a person appearing before the Council has exhausted his administrative remedies until he has filed a request for re-

consideration under subpart F and final action has been taken by the Council under §§ 155.106 through 155.108.

SUBPART E—NOTICES OF PROBABLE VIOLATION; REMEDIAL ORDERS

§ 155.81 Purpose and scope.

(a) This subpart establishes the procedures for determining the nature and extent of violations and the procedures for the issuance of remedial orders.

(b) A “remedial order” is an order requiring a person to cease a violation or to take action to eliminate or to compensate for the effects of a violation, or both, or which imposes other sanctions.

§ 155.82 General.

When any report required by the Council or any audit or investigation discloses, or the Council otherwise discovers, that a person appears to be in violation of the Act or any regulation in this title, the Council may conduct proceedings to determine the nature and extent of the violations and issue remedial orders. The Council may commence proceedings by serving a notice of probable violation or by issuing a remedial order.

§ 155.83 Issuance of notice of probable violation to begin proceedings.

The Council may begin proceedings under this subpart by issuing a notice of probable violation if the Council has reason to believe that a violation has occurred or is about to occur.

§ 155.84 Issuance of remedial orders to begin proceedings in unusual circumstances.

Remedial orders may be issued to begin proceedings under this subpart if the Council finds on preliminary examination that the violations are patent or repetitive, that their immediate cessation is required to avoid irreparable injury to others or unjust enrichment to the person to whom the order is issued, or for any other unusual circumstance the Council deems sufficient.

§ 155.85 Reply.

(a) Within 10 days of receipt of a notice of probable violation issued under § 155.83 or a remedial order issued under § 155.84, the person to

whom the notice or order is issued may file a reply. The reply must be in writing. He may also request an appointment for a personal appearance, which must be held within the 10-day period provided for reply. He may be represented or accompanied by counsel at the personal appearance. The Council will extend the 10-day reply period for good cause shown.

(b) If a person does not reply within the time allowed by a notice of probable violation, the violation will be considered admitted as alleged and the Council may issue whatever remedial order would be appropriate.

(c) If a person has not replied to the Council within the 10-day period provided and a remedial order issued to begin proceedings, the order will go into effect or remain in effect, in accordance with its terms as the case may be.

(d) An order which goes into effect or is permitted to remain in effect under paragraph (c) of this section or an order issued under paragraph (b) of this section is not subject to judicial or any other review with respect to any finding of fact or conclusion of law which could have been raised in the proceedings before the Council by the filing of a reply.

§ 155.86 Order.

(a) If the Council finds, after the person has filed a reply under § 155.85, that no violation has occurred or is about to occur or that for any other reason the issuance of a remedial order would not be appropriate, it will issue an order so stating and, if necessary, revoke or modify any remedial order which already may be outstanding.

(b) If the Council finds that a violation has occurred or is about to occur and that a remedial order is appropriate, it will issue an order so stating and, if necessary, direct remedial action, vacate the suspension of any outstanding remedial order, or modify as appropriate, any outstanding remedial order. The order will state the grounds upon which it is based.

(c) Remedial orders issued hereunder may include any of the provisions stated in § 150.163 of this chapter or subpart J of this part for the kind of violation concerned or any other requirement which is reasonable and appropriate.

§ 155.87 Requests for reconsideration.

Any person aggrieved by an initial action of the Council under this subpart may request reconsid-

eration pursuant to subpart F of this part. Requests for reconsideration of an order under this subpart will be accorded expedited treatment by the Council. The Council will not consider that a person appearing before the Council has exhausted his administrative remedies until he has filed a request for reconsideration under subpart F and final action has been taken by the Council under §§ 155.106 through 155.108.

SUBPART F—REQUESTS FOR RECONSIDERATION

§ 155.101 Purpose and scope.

(a) This subpart establishes the procedures governing reconsideration of initial actions taken under subparts B, C, D, or E of this part.

(b) The Council will not consider that a person who has appeared before the Council in connection with a matter arising under subparts B, C, D, or E has exhausted his administrative remedies until he has filed a request for reconsideration under this subpart and final action thereon has been taken by the Council under §§ 155.106 through 155.108.

§ 155.102 Who may request reconsideration.

Any person aggrieved by an initial action of the Council under subparts B, C, D, or E of this part may request reconsideration.

§ 155.103 Where to file.

A request for reconsideration shall be filed with the IRS or Council official who issued the initial action or decision from which reconsideration is sought.

§ 155.104 When to file.

A request for reconsideration must be filed within 30 days of service of the initial action or decision from which reconsideration is sought.

§ 155.105 Contents of request.

- (a) A request for reconsideration shall—
 - (1) Be in writing and signed by the appellant;
 - (2) Be designated clearly as a request for reconsideration;
 - (3) Contain a concise statement of the grounds for reconsideration and the requested relief;
 - (4) Be accompanied by briefs, if any; and
 - (5) Be marked on the outside of the envelope—"Reconsideration."

(b) If the request for reconsideration is from an order issued under § 155.86 and involves an outstanding remedial order, the envelope should be marked "Reconsideration—Outstanding Remedial Order."

§ 155.106 Reconsideration.

(a) The Council will reconsider its initial action taken under subparts B, C, D or E of this part if a request for reconsideration:

(1) Is made by a person aggrieved by the initial action;

(2) Is timely; and

(3) Makes a prima facie showing that the Council's initial action was erroneous in fact or in law.

(b) The Council may summarily reject a request for reconsideration which is not timely or which was filed by a person other than the one against whom the initial action was taken.

(c) The Council may summarily reject a request for reconsideration which fails to make a prima facie showing that the Council's initial action was erroneous in fact or in law, in which case it will notify the applicant of its action. Such appellant may seek judicial review under the Act.

(d) When a request for reconsideration meets the requirements set forth in paragraph (a) of this section, the Council will proceed in accordance with § 155.107 through § 155.108.

(e) The Council on its own motion may consider any additional evidence that it deems relevant and which in its opinion the party did not have a reasonable opportunity to present previously.

§ 155.107 Hearing.

(a) If the Council in its discretion deems that a hearing or conference is advisable, it will, as expeditiously as possible after receiving the request for reconsideration, direct that a hearing or conference be held before a Hearing Officer or District conferee.

(b) When a hearing or conference has been directed in accordance with paragraph (a) of this section, it will be conducted promptly after written notice has been served on the appellant, at such time and place as the Council may direct.

(c) When a hearing is conducted in accordance with this section, the appellant may present oral argument and submit such additional documentary evidence as the Hearing Officer or District conferee allows.

(d) When administratively feasible, within 30 days after the close of the hearing, the Hearing Officer or District conferee will submit to the Council a report and any recommendation he deems appropriate with respect to the appellant's request for reconsideration.

§ 155.108 Decision by Council.

(a) When administratively feasible, within 10 days of receipt of a request for reconsideration, or within 30 days of a Hearing Officer's or District conferee's report, when a hearing or conference has been held, the Council will make a decision and issue an order. However, if a remedial order is outstanding and reconsideration is sought from an order under § 155.86, the Council will make every effort to expedite the issuance of an order under this section. It is expected that such orders will ordinarily issue within 10 days of receipt of the request for reconsideration.

(b) When an order grants the requested relief, a copy of the order will be served upon the party to the proceedings.

(c) When the order denies the requested relief in whole or in part, the Council will set forth the grounds therefor, and advise appellant that he has exhausted his administrative remedies.

§ 155.109 Stays pending reconsideration.

As part of a request for reconsideration, any person may request a stay of the initial action for which reconsideration is sought pending final disposition of the request for reconsideration. The Council may grant a request for stay for good cause shown.

SUBPART G—COMPROMISE OF CIVIL PENALTIES

§ 155.121 Purpose and scope.

(a) Under section 208(b) of the Economic Stabilization Act of 1970, as amended, whoever violates an order or regulation issued by the Council (or an order or regulation by the Price Commission during the time that such order or regulation was or is in effect) under that Act is subject to a civil penalty of not more than \$2,500 for each violation. This subpart prescribes procedures governing the compromise and collection of those civil penalties which the Council considers appropriate or advisable to settle through compromise.

(b) Except as provided in paragraph (c) of this section, in the case of violations of price stabilization regulations and orders by price category III firms and for late filings of reports by all firms, the District Director of a key IRS district office may settle civil penalty cases through compromise.

(c) In the case of violations of price stabilization regulations and orders by institutional and noninstitutional providers of health services subject to Subpart O of part 150 of this chapter, and all other violations, the General Counsel of the Cost of Living Council may settle civil penalty cases through compromise.

§ 155.122 Notice of possible compromise of penalties.

If the Council considers it appropriate or advisable under the circumstances of a particular civil penalty case to settle it through compromise, the General Counsel of the Cost of Living Council, or his delegate, or district director of a key IRS district office, as appropriate, sends a letter to the person charged with the violation advising him of the charges against him, the order or regulation that he is charged with violating, and the total amount of penalty involved, and that the Council is willing to consider an offer in compromise of the amount of the penalty.

§ 155.123 Response to notice.

(a) A person who receives a notice pursuant to § 155.122 may present to the General Counsel or district director, as appropriate, any information or material bearing on the charges that denies, explains, or mitigates the violation. The person charged with the violation may present the information or materials in writing or he may request an informal conference for the purpose of presenting them. Information or materials so presented will be considered in making a final determination as to the amount for which a civil penalty is to be compromised.

(b) A person who receives such a notice may offer to compromise the civil penalty for a specific amount by delivering to the General Counsel or district director, as appropriate, a certified check for that amount payable to the Treasurer of the United States. An offer to compromise does not admit or deny the violation.

§ 155.124 Acceptance of offer to compromise.

(a) The General Counsel or district director, as appropriate, may accept or reject an offer to compromise a civil penalty. If he accepts it, he sends a letter to the person charged with the violation advising him of the acceptance.

(b) If the General Counsel or district director, as appropriate, accepts an offer to compromise, that acceptance is in full settlement on behalf of the United States of the civil penalty for the violation. It is not a determination as to the merits of the charges. A compromise settlement does not constitute an admission of violation by the person concerned.

§ 155.125 No compromise.

If a compromise settlement of a civil penalty cannot be reached, the General Counsel may refer the matter to the Attorney General for the initiation of proceedings in a U.S. district court to collect the full amount of the penalty, or take such other action as is necessary.

SUBPART H—PETITION AND COMMENT ON RULEMAKING

§ 155.141 Purpose and scope.

(a) The provisions of 5 U.S.C. 553 will be followed for the issuance of all regulations or amendments to regulations by the Council, to the extent such provisions apply.

(b) In addition, the Council will accept from interested persons written comments on or written objections to its regulations or its published rulings at any time. If in the opinion of the Council such comments or objections warrant a proceeding similar to a rule making proceeding as provided by 5 U.S.C. 553, the Council will conduct such a proceeding pursuant to notice published in the **FEDERAL REGISTER**.

§ 155.142 Who may file.

Any interested person may file a comment on or objection to a regulation or published ruling at any time.

§ 155.143 Where to file.

A written comment or objection to a regulation or published ruling shall be filed with the Cost

of Living Council, 2000 M Street, N.W., Washington, D.C. 20508.

SUBPART I—PUBLISHED RULINGS

§ 155.161 Rulings for publication.

From time to time, the General Counsel of the Cost of Living Council will issue rulings for publication in the Federal Register which are:

- (a) Of general applicability,
- (b) Illustrative of a general principle, or
- (c) Of assistance to the public in applying the Act, regulations and guidelines to a specific situation.

SUBPART J—PROFIT MARGIN LIMITATIONS: COUNCIL ACTIONS

§ 155.171 Applicability.

This subpart applies to all activities of a firm subject to a profit margin limitation under Part 150.

§ 155.172 Definitions.

For the purposes of this subpart:

“Base level” of an item means the greater of the base price of that item as determined in accordance with Subpart F of Part 150 of this chapter or the adjusted freeze price of that item as defined in Subparts E or K of Part 150 of this chapter.

§ 155.173 General.

The Council may make the determination of whether a firm is in violation of a profit margin limitation prescribed in this chapter—

(a) In the case of any firm, on the basis of whether that firm’s profit margin, for the fiscal year in which it made a charge above a base level, exceeded its base period profit margin; and

(b) In the case of a price category I or II firm, on the basis of whether that firm’s profit margin for any quarter of that fiscal year, after such a charge is made, is at the rate that would, when projected for the entire fiscal year, exceed its base period profit margin and the firm fails to demonstrate, to the satisfaction of the Council, that its base period profit margin will not be exceeded for that fiscal year, for reasons such as seasonal patterns.

§ 155.174 Council actions.

The Council may take any action specified in § 155.175, § 155.176, § 155.177 or § 155.179, as applicable with respect to a violation of a profit margin limitation prescribed in this chapter.

§ 155.175 Violations during first, second, or third quarter of firm’s fiscal year.

Whenever, pursuant to paragraph (b)(2) of this section, the Council determines that a firm is illegally exceeding its base period profit margin for the first quarter, or for the second or third quarter (on a cumulative basis), the Council may, at the option of the violator, order the action specified in paragraph (a) or (b) of this section.

(a) (1) Order the firm immediately to lower the price of any or all of its products or services to base levels; and

(2) Order either—

(i) A refund, within a period prescribed by the Council of the revenues derived from the prices charged in violation of this section to the extent that they exceeded the revenues from the prices which otherwise would have been chargeable, to the persons who paid those prices, if they are reasonably identifiable; or

(ii) If those persons are not reasonably identifiable, a reduction of the prices below base levels, as appropriate, by an amount that will equal the amount by which the revenues from the prices in violation of this section exceeded the prices which otherwise would have been chargeable, by the end of the fiscal quarter following the fiscal quarter in which the order of the Council is issued.

(b)(1) With respect to a violation occurring during the first quarter of the firm’s fiscal year, order price reductions sufficient to ensure that the profit margin on the firm’s quarterly report for the fiscal quarter following the fiscal quarter in which the order of the Council is issued, will not exceed the firm’s base period profit margin.

(2) With respect to a violation occurring during the second quarter of the firm’s fiscal year, order price reductions sufficient to ensure that the profit margin on the firm’s quarterly report for the last quarter of its fiscal year will not exceed the firm’s base period profit margin.

(3) With respect to a violation occurring during the third quarter of the firm’s fiscal year, order price reductions sufficient to ensure that the profit margin on the firm’s quarterly report for the first

quarter of the fiscal year following the fiscal year in which the violation occurred will not exceed the firm's base period profit margin.

§ 155.176 Violation for fiscal year, if persons who paid the illegal charges are reasonably identifiable.

Whenever, pursuant to § 155.173 of this part, the Council determines that a firm has illegally exceeded its base period profit margin for the fiscal year, and the persons who paid the illegal prices are reasonably identifiable, the Council may order—

(a) The refund of revenues derived from the prices in violation to the extent that they exceed the revenues from prices which otherwise would have been chargeable, or the dollar value of the excess profit margin, whichever is less; and

(b) The reduction of prices to the extent necessary to lower the firm's revenues by an amount equal to two times the amount that the revenues derived from the prices in violation exceeded the revenues which otherwise would have been realized; or equal to two times the dollar value of the excess profit margin, whichever is less, by the end of the third quarter of the fiscal year following the fiscal year in which the violation occurred.

§ 155.177 Violation for fiscal year, if persons who paid the illegal charges are not reasonably identifiable.

Whenever, pursuant to § 155.173 the Council determines that a firm has illegally exceeded its base period profit margin for the fiscal year, and the persons who paid the illegal prices are not reasonably identifiable, the Council may order the reduction of prices to the extent necessary to lower the firm's revenues by an amount equal to three times the amount that the revenues derived from the prices in violation exceeded the revenues which would otherwise have been realized, or equal to three times the dollar value of the excess profit margin, whichever is less, by the end of the third quarter of the fiscal year following the fiscal year in which the violation occurred.

§ 155.178 Deduction of refunds.

For the purpose of computing a firm's profit margin in any quarter or fiscal year following a quarter in which it made refunds or reductions pursuant to an order issued under this section, that

firm may not be allowed to deduct from its revenues the amount of those refunds or reductions that it made.

§ 155.179 Violation of order.

If a firm violates any provision of an order under this section, the Council may order it to reduce prices still further to the extent necessary to lower its revenues by an amount equal to two times the amount ordered to be refunded or reduced under this section, reduced to the extent that the firm has partially complied with the previous order.

§ 155.180 Prohibition of further price increases.

In any case in which the Council considers a firm to be in violation of its profit margin limitations, the Council may order that firm to make no further price increases without the specific approval of the Council.

§ 155.181 Custom products or services.

(a) Notwithstanding any other provisions of this subpart, a firm which exceeds its base period profit margin limitation in the same fiscal year in which it sells a custom product or service subject to Subpart F of Part 150, and which does not qualify for the Special Rule in § 150.11(d)(iii), shall be required to disgorge, through refunds or price reductions, an amount as follows:

(1) in the case of a firm which did not, in that fiscal year, charge a price for any item which exceeds the base level: an amount which bears the same ratio to the dollar value of the profit margin excess that its sales of custom products and custom services bears to total sales;

(2) in the case of a firm which in that fiscal year charged a price for an item in excess of the base level

(i) where the dollar value of the profit margin excess is equal to or less than the revenues derived from the prices in violation to the extent that they exceed the revenues which otherwise would have been chargeable: the dollar value of the profit margin excess; and

(ii) where the revenues derived from the prices in violation to the extent that they are less than the revenues which otherwise would have been chargeable, exceed the dollar value of the profit margin excess: those revenues, plus an amount which bears the same ratio to the difference between those

revenues and the dollar value of the profit margin excess that the firm's sales of custom products and custom services bears to total sales.

(b) For purposes of computing the ratio which sales of custom products or services bear to total sales pursuant to paragraph (a) of this section, a firm shall exclude from sales of custom products or services, for its first fiscal year ending after August 12, 1973, and before January 1, 1974, any sales of a custom product or service, after August 12, 1973, under a contract entered into before August 13, 1973.

SUBPART K—PROFIT MARGIN REPURIFICATION

§ 155.191 Scope.

The subpart applies to any firm subject to a profit margin limitation imposed by Part 150 of this chapter.

§ 155.192 Definitions.

For the purposes of this subpart:

“Base level” of an item means the greater of the base price of that item as determined in accordance with Subpart F of Part 150 of this chapter or the adjusted freeze price of that item as defined in Subparts E or K of Part 150 of this chapter.

“Internal Revenue Service” means the District Director of the key IRS District Office which serves the district in which the corporate headquarters of the firm concerned are domiciled.

“Price Category I or II firm” means a price category I firm or a price category II firm as defined in Subpart C of Part 150 of this chapter.

“Price Category III firm” means a price category III firm as defined in Subpart C of Part 150 of this chapter.

§ 155.193 General rule.

Any firm subject to a profit margin limitation under Part 150 of this chapter is not subject to that limitation if, before the end of the fiscal year in which it charged a price above the base level, the firm (a) rescinds all price increases above base levels, and (b) in conformity with §§ 155.194, 155.195 and 155.196 of this subpart, remits to customers in the form of refunds, or future sales at prices below base levels of the same goods and services previously sold at prices above base levels, or

both, an amount equal to or greater than the revenues derived in the fiscal year from charging a price or prices in excess of base price levels.

§ 155.194 Price Category I and II Firms.

(a) A price category I or II firm may take action to reduce prices to base levels at any time.

(b) Before remitting revenues derived from charging prices above base levels, each firm shall submit, for the approval of the Internal Revenue Service, a letter of intent to remit revenues under this regulation. If the firm receives no written response to its letter of intent within 20 days after the date it was received by the Internal Revenue Service, the firm may assume approval and proceed to remit revenues in accordance with § 155.196 of this part.

(c) To be eligible for Internal Revenue Service approval under this subpart, a letter of intent must be received at such a time before the end of the firm's fiscal year as will allow Internal Revenue Service review thereof in accordance with paragraph (b) of this section and as will allow the firm to fully execute the plan for remission, of revenues before the end of that fiscal year. In any event, a letter of intent must be received at least 30 days before the end of that fiscal year.

(d) Each letter of intent to remit revenues shall include a revenue remission plan presenting the following information:

(1) The amount of revenue the firm has received as a result of having increased the price of property or services, or both, above base levels, indicated by product, product line, service, or service line;

(2) The above-base-level selling price, the base level, and the proposed below-base-level selling price of each product, product line, service or service line;

(3) The sales figures and other information which demonstrates that the proposed prices below base level will result in remission of revenues derived from charging prices above the base level;

(4) The period of time during which the remission of revenues will take place;

(5) The anticipated effect of the firm's price reductions on competition and the manner in which the firm's revenue remission plan will minimize disruption of competitive pricing patterns; and

(6) The amount of revenues which can be refunded to customers.

§ 155.195 Price Category III Firms.

A price category III firm which intends to make price reductions and refunds pursuant to this subpart shall, before remitting revenues derived from charging prices above base levels, record its intent in a notarized statement.

§ 155.196 Remission of Revenues.

(a) Remission of revenues derived from charging prices above base levels shall be made first in the form of refunds to individual customers who purchased goods and services at prices in excess of base levels, to the extent that those customers are reasonably identifiable. For the purpose of making refunds pursuant to this subpart, "customer" means, so far as possible, the ultimate consumer. To the extent that customers are not reasonably identifiable, remission of the balance of revenues derived from charging prices above base levels shall be made to customers of the same class as those charged the increased prices through the reduction of the price of those items which were raised above base levels to below base levels, so that the difference between the revenues realized at the reduced prices and the revenues which would have been realized if the sales had been made at base levels is equal to or greater than the revenues (net of any refunds) derived from charging prices above base levels.

(b) Each firm that remits revenues shall make such arrangements with its immediate customers, purchasers, dealers, employees or agents as are necessary to obtain and maintain records of the names and addresses of ultimate consumers who are reasonably identifiable in accordance with normal business practices and to assure that refunds are in fact made to such ultimate consumers.

§ 155.197 Reporting Requirements.

No firm is considered to be restored to the position of a firm which has not raised any prices above base levels until it has carried out its revenue remission plan and complied with all of the applicable requirements of §§ 155.193 through 155.196 of this part. Upon meeting these requirements, a price category I or II firm may submit the certification of no price increase which, pursuant to the instructions to the Form CLC-22, certain firms which have not charged any price above the base level may use in lieu of reporting on price increases. However, the first certification of no

price increase submitted after remission of revenues pursuant to this regulation shall be accompanied by a report which includes:

(a) A statement signed by that firm's chief executive officer (or other authorized officer) certifying that all selling prices of those items which were previously raised above base levels have been reduced to base levels; and

(b) The following information, set forth in detail, showing that all other curative actions have been completed:

(1) The dollar amount of the revenues which the firm received as a result of having charged a price for items above base levels during the current fiscal year;

(2) The names and addresses of all customers, if any, to whom the firm has made refunds pursuant to this subpart, together with the amounts refunded in each case and the date of each refund;

(3) The nature, type, and extent of price reductions below base levels which the firm did, in fact, institute pursuant to this subpart including the dollar amount of the revenues realized from sales at below base levels compared with the dollar amount of the revenues which would have been received if those sales had been made at base levels.

§ 155.198 Effect of Price Reductions.

This subpart does not relieve any firm of its obligations under the Clayton Act, the Federal Trade Commission Act, or any law with a similar purpose; nor does it permit or obligate any firm to do any act or engage in any practice which would violate any of those laws.

APPENDIX

Example 1. Firm A, a price category I firm which operates on a calendar-year basis, raised a few prices above base levels early in Phase IV. The firm finds it is exceeding its base period profit margin on the basis of its third quarter's performance and believes it will be unable to demonstrate that it will not exceed its base period profit margin for its full fiscal year. Consequently, before December 31, 1973, Firm A returns all prices to base levels and either makes refunds or reduces the prices on the same items to below base levels to the extent necessary to remit all revenues derived from charging prices above base levels as provided in this subpart. Firm A is no longer subject to a profit margin limitation and will remain free

therefrom until it again raises a price above the base level.

Example 2. A remedial order was issued to Firm B because it raised prices above base levels in Phase IV and exceeded its base period profit margin for the third quarter of its fiscal year. The order, among other things, directed Firm B to (1) reduce all prices to base levels and (2) at the firm's option, to either (a) remit revenues derived from charging prices in excess of base levels or (b) further reduce prices by an amount sufficient to assure that by the end of the firm's fourth quarter the firm's profit margin will not exceed its base period profit margin.

Firm B wishes to conform to the requirements of this subpart. It therefore reduces all prices to base price levels and selects option 2(a) in the order. In carrying out option 2(a) it follows all applicable requirements of this subpart, including the submission of a letter of intent (§ 155.195) and the making of refunds to identifiable customers (§ 155.196). The decision of Firm B to meet the requirements of this subpart does not, however, relieve it of any additional requirements placed upon it by the remedial order.

Example 3. Firm C raised the price of its one product above the base level during its 1973 fiscal year but did not exceed its base period profit margin for fiscal year 1973. During the first month of its 1974 fiscal year, Firm D's profit margin appears to be rising substantially due in large measure to greatly increased demand for its product and related decreases in cost per unit. Firm C continues to charge the same increased price for its product in FY 1974 as it did last year.

Anticipating a profit margin excess for fiscal year 1974, Firm C elects to return to base levels and to remit all revenues derived in fiscal year

1974 from the price increase above base levels which was instituted in 1973. Having no identifiable customers, the firm determines that it would have to reduce the price of its product to a level below the base level for a period of three months in order to remit revenues (in the form of reduced prices) equal to or greater than the revenues derived in FY 1974 from the price charged in excess of the base price. With a price per unit at \$2.00 above the base level and 20,000 units sold to date in FY 1974, Firm C determines that a total price decrease of \$2.50 (50 cents below base level) with projected sales of at least 80,000 units over the next 3 months will result in remission of the \$40,000 in revenues derived in FY 1974 from the price charged in excess of the base level.

After five months of sales as anticipated at prices below the base level, Firm C finds that it has met the requirements of this subpart with respect to remission of revenues and thereupon increases the price of the product to the base level. There are no price increases above base levels during the 1974 fiscal year, and Firm C exceeds its base period profit margin for FY 1974. Under the facts presented, there is no profit margin violation.

Example 4. Firm C, under the same facts as example 3 except that some customers are identifiable, works through its dealers (independent contractors) to identify and to refund directly to consumers who purchased its product in FY 1974 a total of \$20,000. This leaves a balance of \$20,000 which must be remitted in the form of sales at prices below the base level. Firm C lowers its price to 25 cents below base level and sells 80,000 units at that price over a three-month period. This results in a remission of an additional \$20,000, and Firm C has met the requirements of this subpart with respect to remission of revenues.

ECONOMIC STABILIZATION PROGRAM,
COST OF LIVING COUNCIL,
Washington, D.C., August 30, 1973.

Memorandum for CLC Staff.

From : James W. McLane, Deputy Director.

Subject : CLC Phase IV Reorganization.

Like most agencies, the Cost of Living Council is constantly reviewing internal operations to increase its effectiveness. With the advent of Phase IV and the delegation of substantial operating authority to the Internal Revenue Service, we have effected several organizational changes to improve stabilization program operations. All of these changes have already been announced and implemented.

This memorandum formalizes these changes and standardizes organizational titles.

The Office of Price Stabilization supersedes the Office of Price Monitoring. This Office includes a newly established Energy Division.

The Office of Operations is the principal operational line to the Internal Revenue Service in carrying out stabilization functions.

The Office of Health supersedes the Health Committee staff.

The Office of Food supersedes the Food Committee staff.

Organizational titles are as follows :

*Heads of Offices : Associate Director or Administrator, Deputy Associate Director or Deputy Administrator.

Heads of Divisions : Director of Division, Deputy Director of Division.

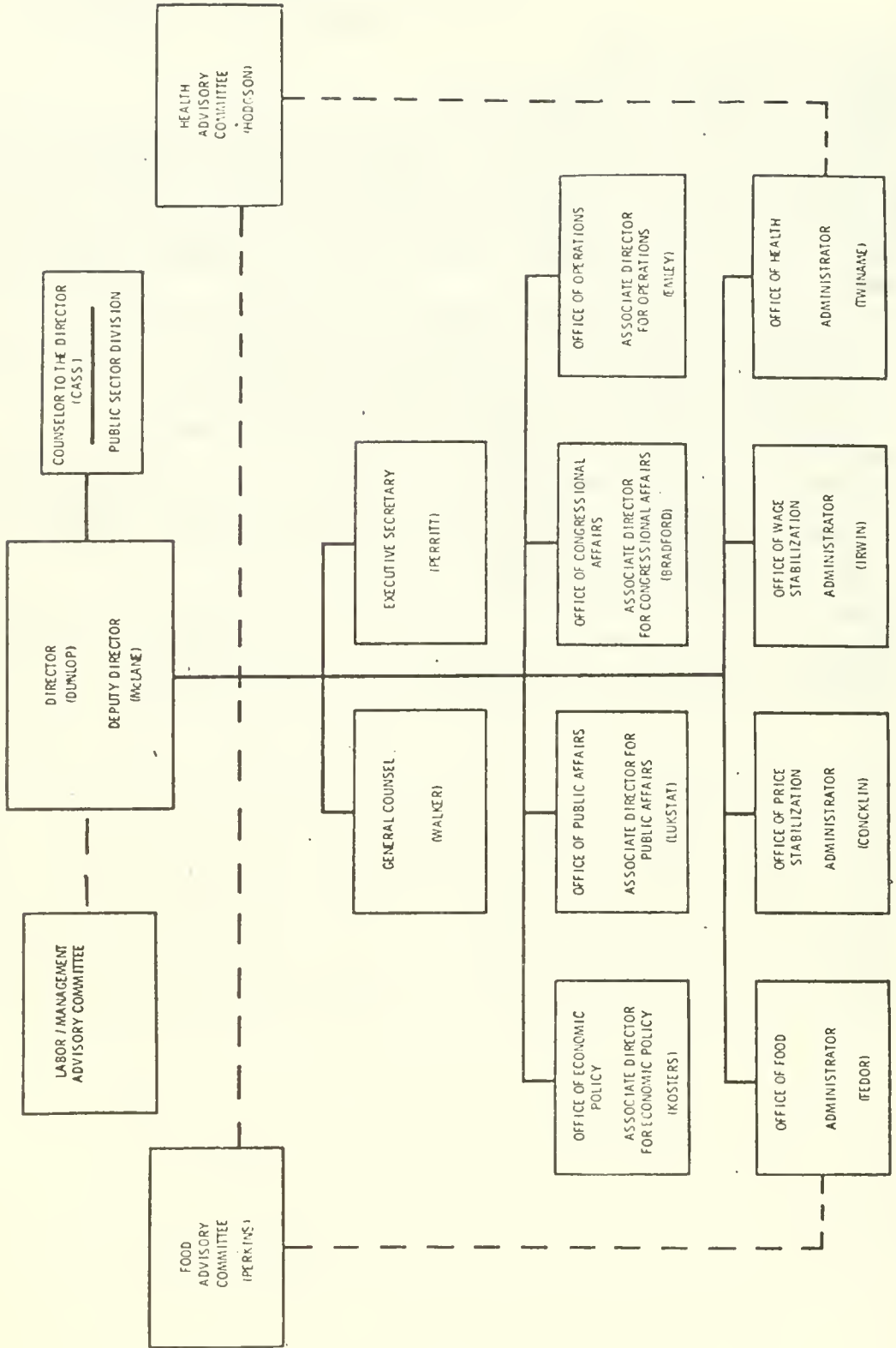
Heads of Branches : Branch Chief, Assistant Branch Chief.

Heads of Sections : Section Chief.

*Associate Director—Operations, Economic Policy, Public Affairs, and Congressional Affairs.

Administrator—Food, Health, Price Stabilization, and Wage Stabilization.

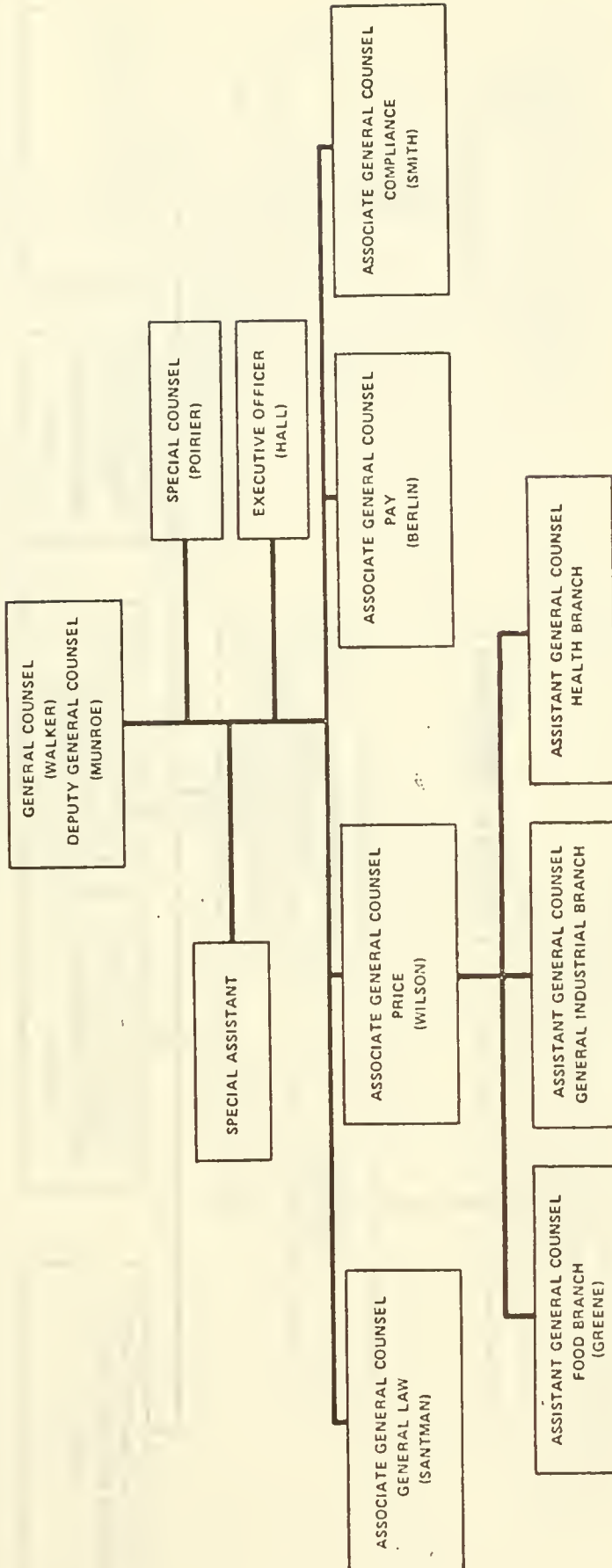
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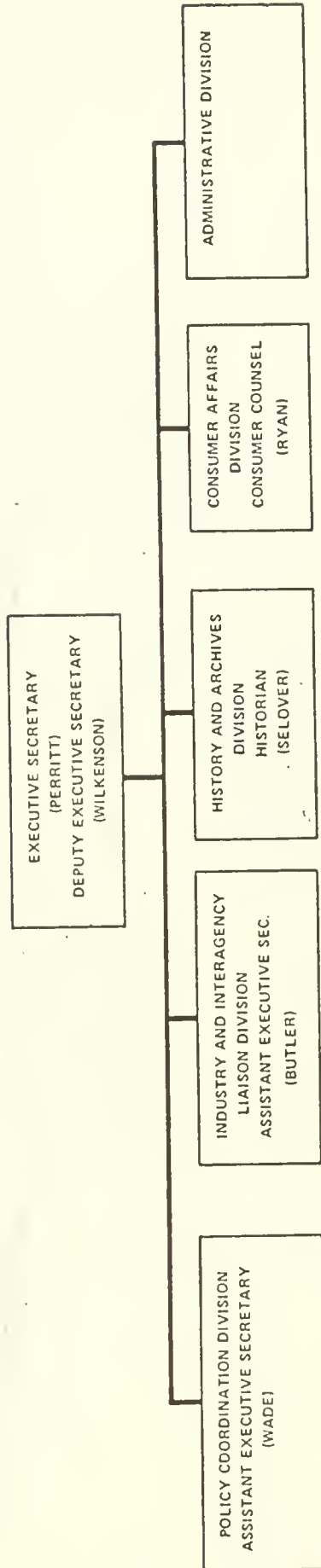
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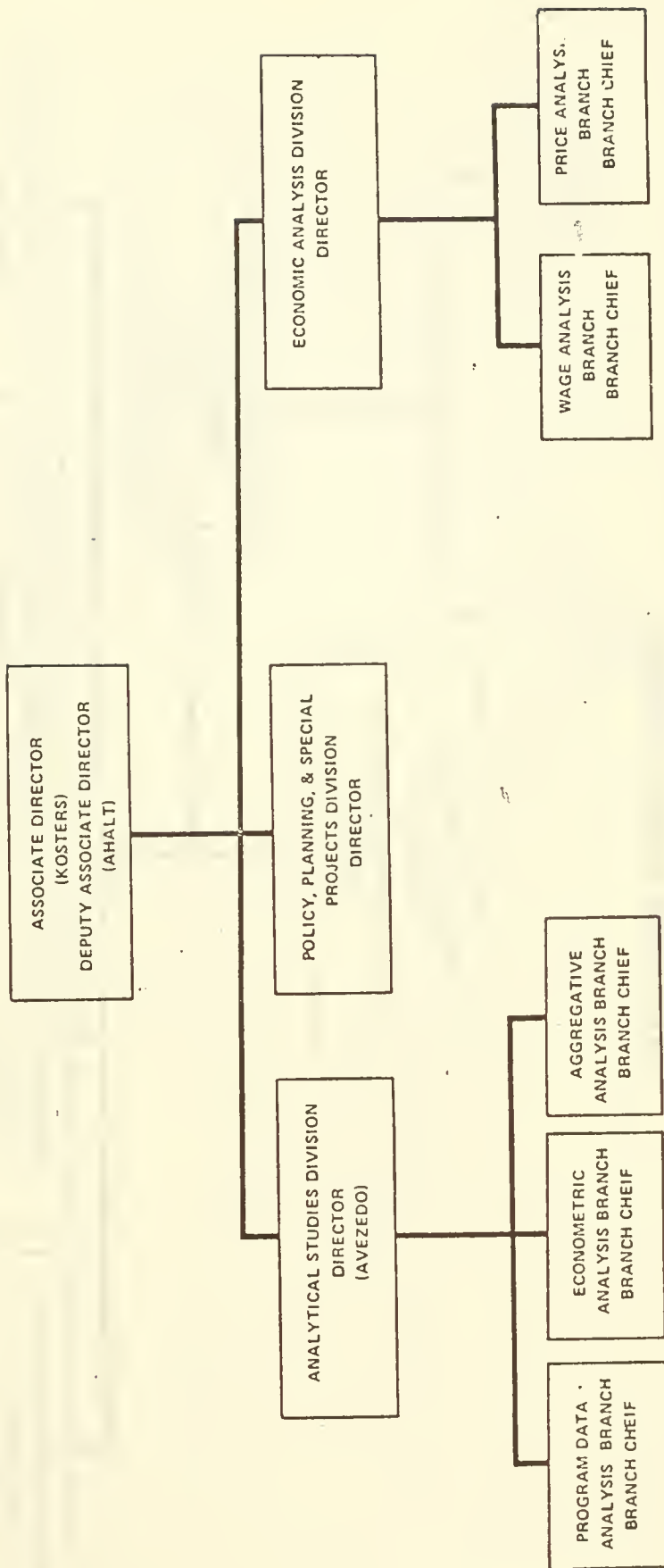
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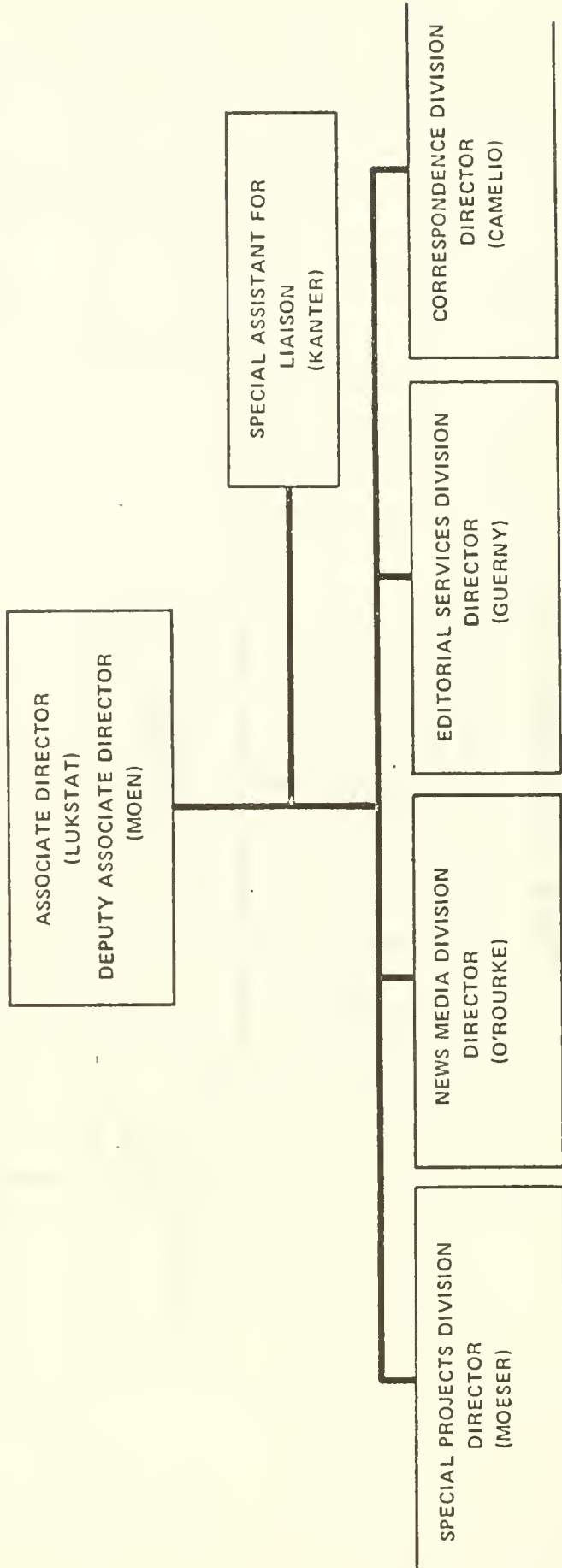
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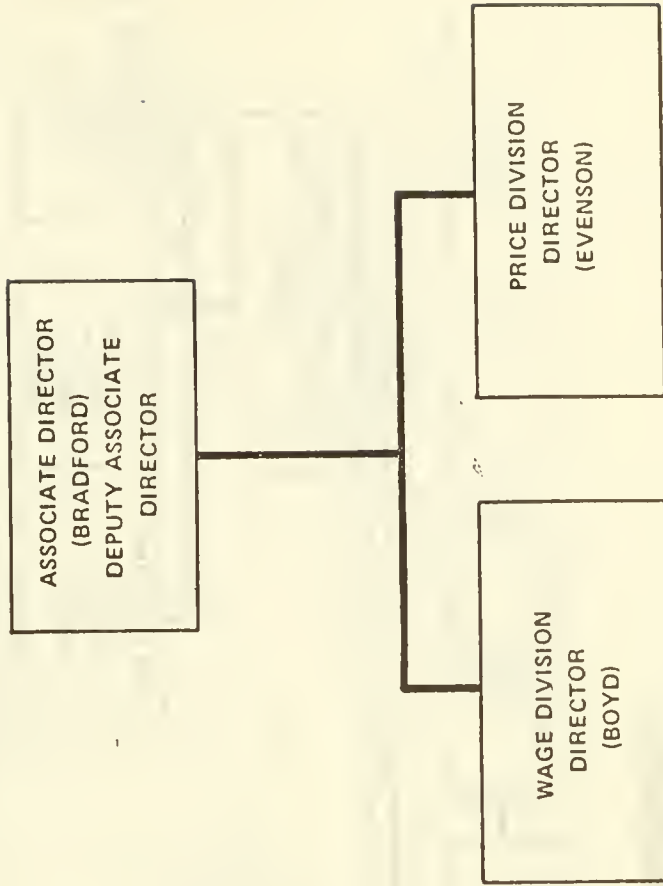
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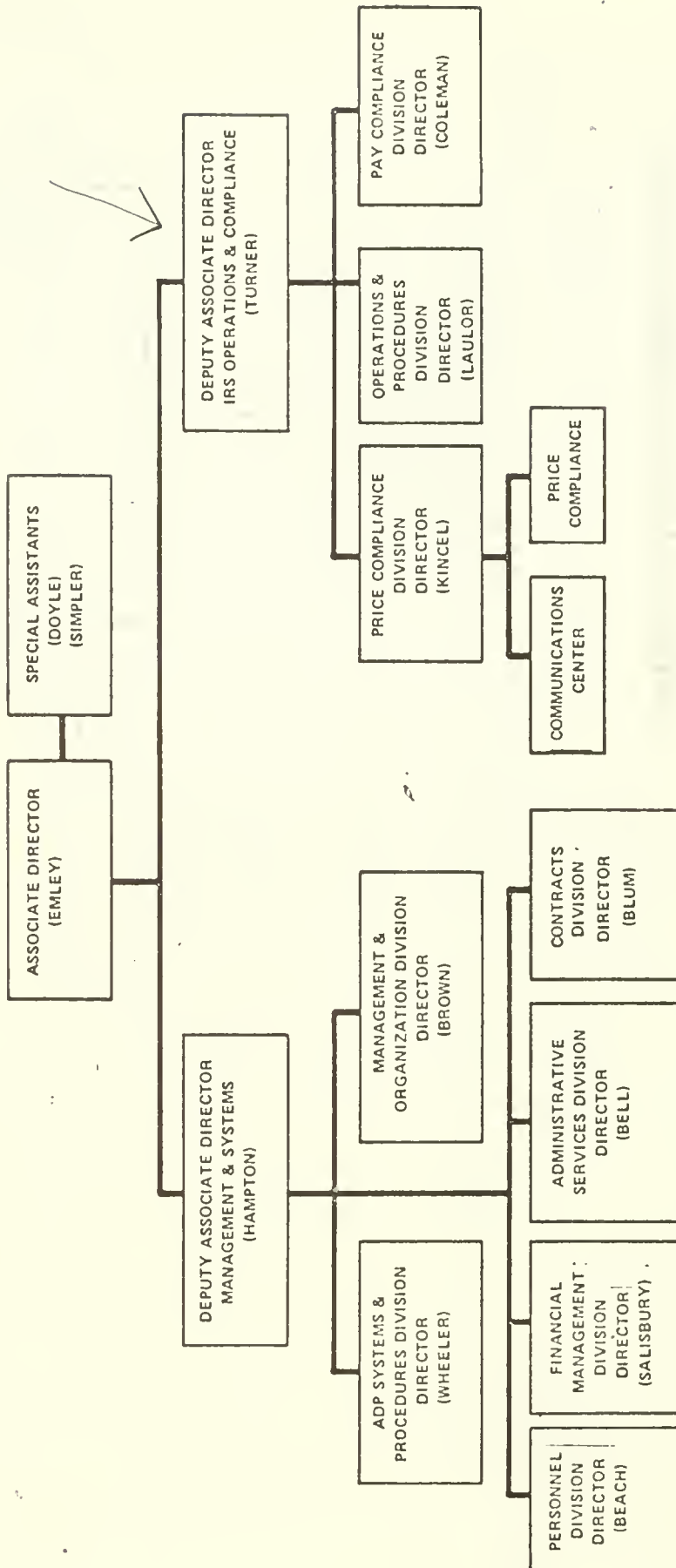
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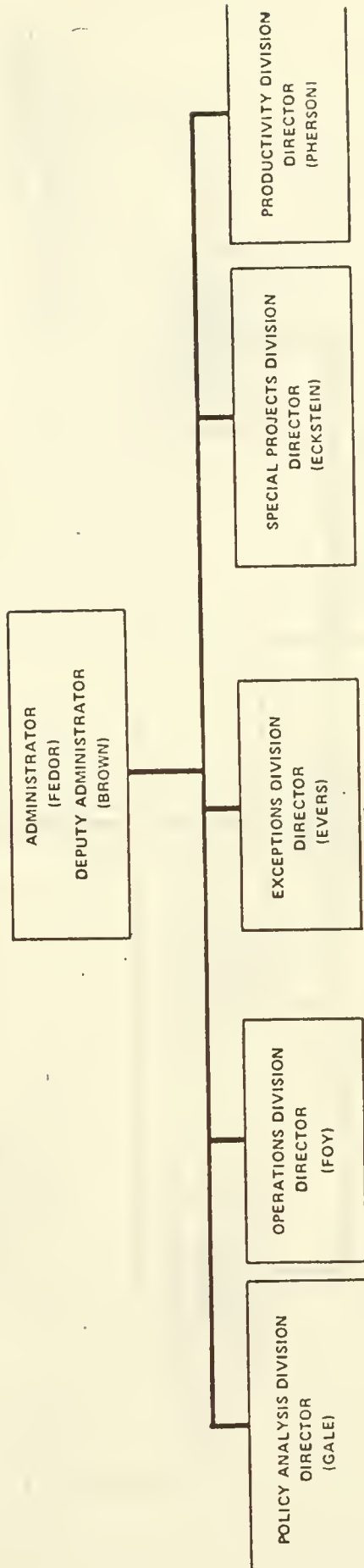
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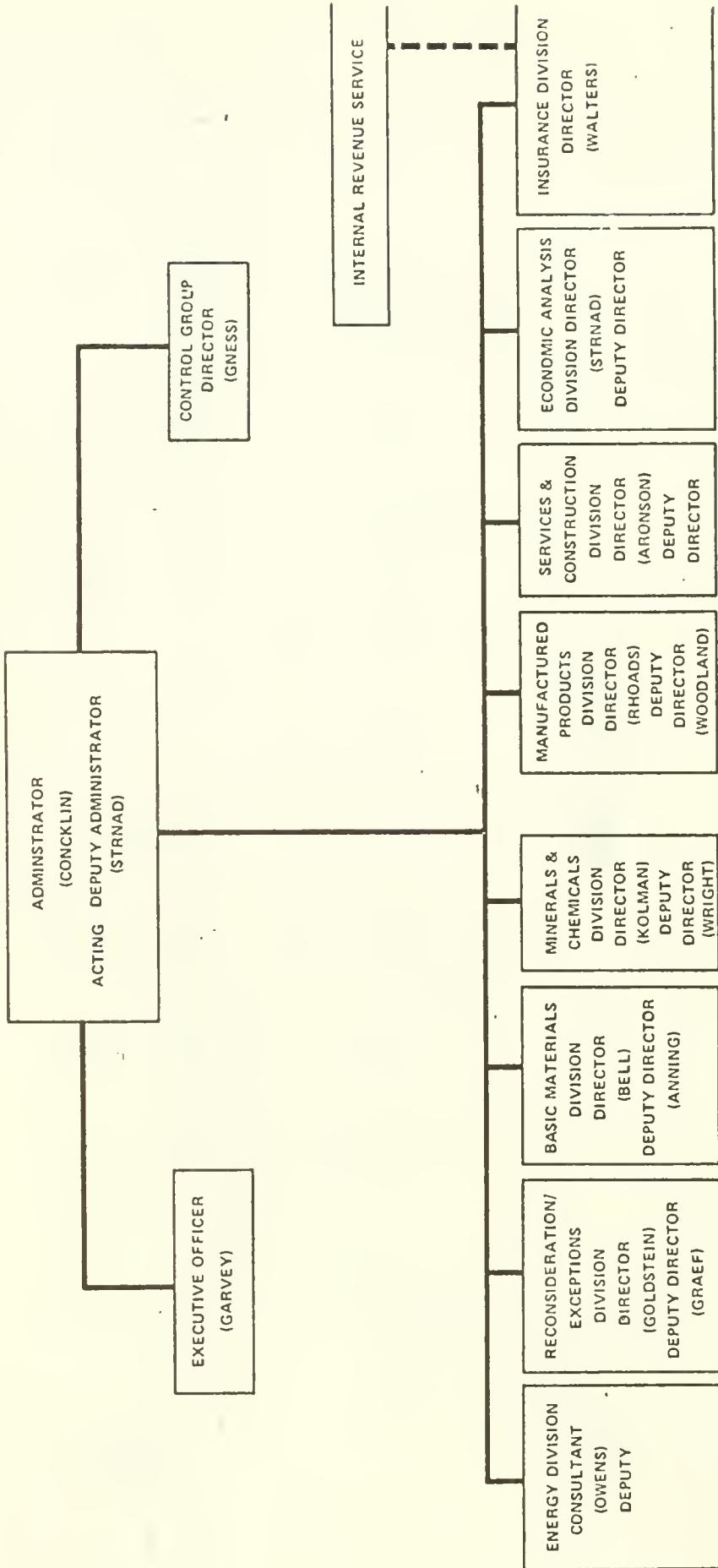
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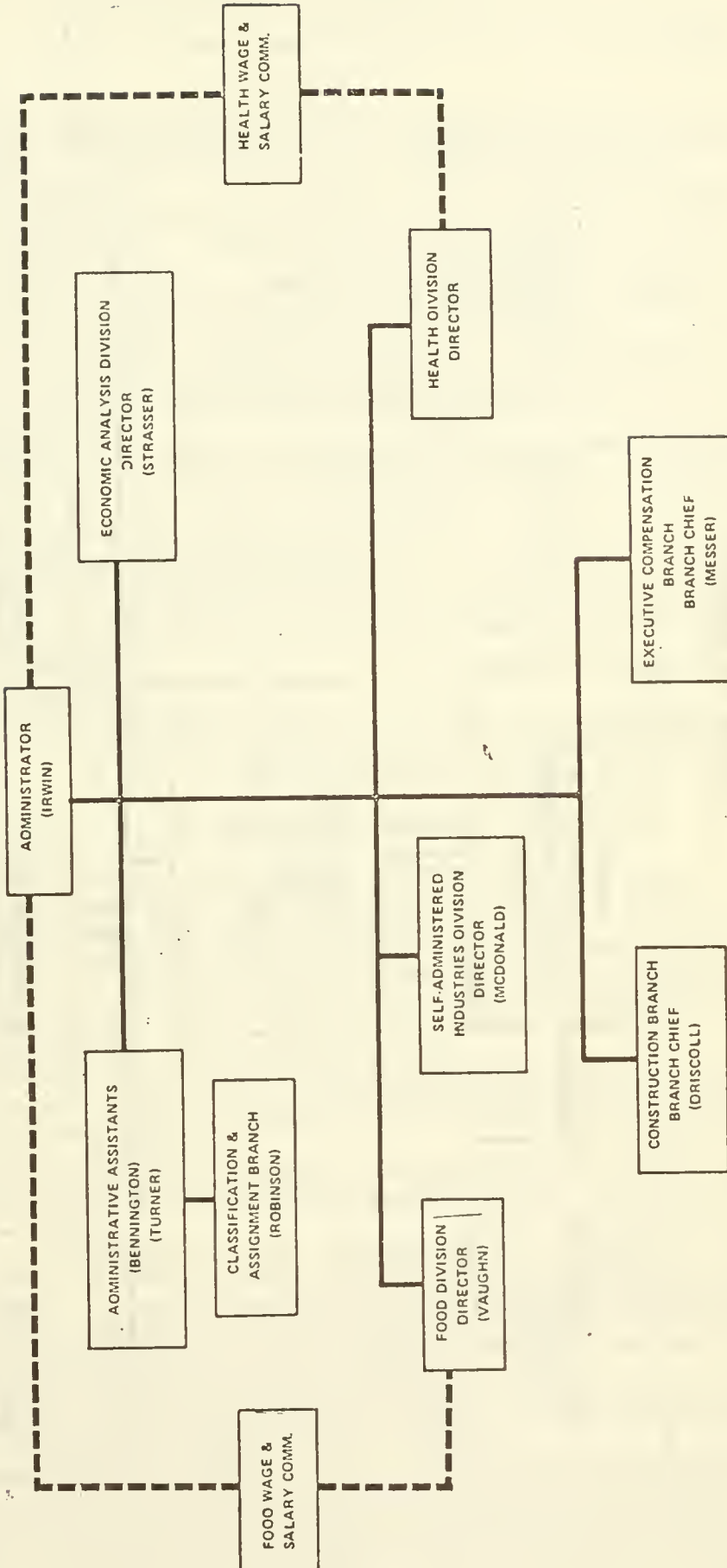
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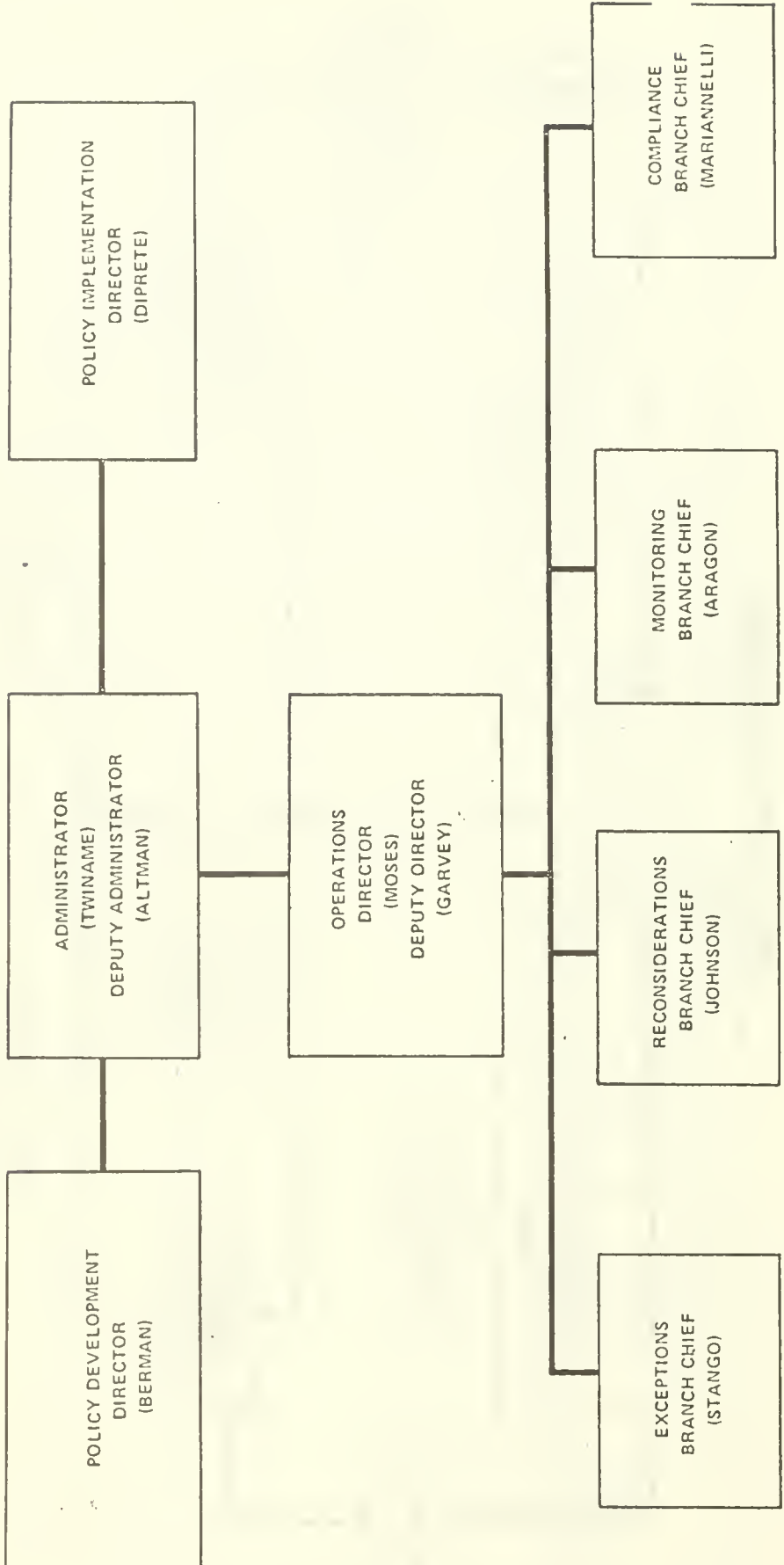
OFFICE OF PRICE STABILIZATION



OFFICE OF WAGE STABILIZATION



OFFICE OF HEALTH



VARIOUS DELEGATIONS OF AUTHORITY UNDER THE ECONOMIC STABILIZATION AGENCY

DELEGATION OF AUTHORITY FROM THE CLC TO SECRETARY OF THE TREASURY

CLC ORDER NO. 37

Pursuant to the authority delegated to me as Chairman of the Cost of Living Council by Executive Order 11695, as continued by Executive Order 11730, it is hereby ordered as follows:

1. There is hereby delegated to the Secretary of the Treasury authority to perform the following price stabilization functions except as provided in paragraph 2 of this order.

(a) Operate and maintain local service and compliance centers, especially in key district centers, in support of the Economic Stabilization Program as it pertains to price stabilization matters.

(b) Receive and process price stabilization forms, reports, applications, requests, and other information required to be submitted pursuant to the price stabilization regulations in Title 6, Code of Federal Regulations, or any order issued thereunder.

(c) Make decisions and issue orders with respect to notices of proposed price increases filed pursuant to Part 150 of Title 6, Code of Federal Regulations except.

(1) Those involving a prenotified price increase on a product, product line, service, or service line of \$10 million or more;

(2) Those involving a prenotified price increase on a product, product line, service or service line of \$5 million or more and an increase of 5% or more in a firm's annual sales or revenues over its sales or revenues for the most recently completed fiscal year; and

(3) Such other prenotified price increases as the Director of the Cost of Living Council or his delegate may direct.

(d) Make decisions and issue orders with respect to all special filings submitted pursuant to Part 150 of Title 6, Code of Federal Regulations (except as the Director of the Cost of Living Council or his delegate may direct) including—

(1) Applications for modification of prenotification requirements [6 CFR 150.151(b)(2)(iv)(A)];

(2) Applications for volatile pricing authority [6 CFR 150.156];

(3) Reports supporting loss or low profit firm pricing [6 CFR 150.201]; and

(4) Merchandise pricing plans [6 CFR, Subpart K of Part 150].

(e) Make decisions and issue orders with respect to individual requests for exceptions (other than class exceptions and such individual requests as the Director of the Cost of Living Council or his delegate may direct) from the price stabilization regulations in Title 6, Code of Federal Regulations, or any order issued thereunder.

(f) Monitor submissions of periodic and one-time reports required to be submitted pursuant to Part 150 of Title 6, Code of Federal Regulations to ensure completeness and accuracy and to determine compliance with relevant price stabilization regulations and orders.

(g) Conduct investigations to determine compliance with the price stabilization regulations in Title 6, Code of Federal Regulations, and the orders issued thereunder.

(h) Sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths, all in accordance with Section 206 of the Economic Stabilization Act of 1970, as amended, with respect to functions delegated by this order and, subject to the concurrence of the General Counsel of the Cost of Living Council seek judicial enforcement of those subpoenas.

(i) Notify persons of probable violations of the price stabilization regulations and orders, issue remedial orders, monitor remedial activities, and approve compliance actions with respect thereto.

(j) Compromise and collect civil penalties for violations of price stabilization regulations and orders by price category III firms and for late filings of required price stabilization reports by price category I and price category II firms.

(k) Subject to the guidance of the General Counsel of the Cost of Living Council, issue to individuals and individual firms interpretations of the price stabilization regulations in Part 150 of Title 6, Code of Federal Regulations.

(l) Make decisions and issue orders with respect to requests for reconsideration of initial decisions made and orders issued pursuant to the authority delegated by subparagraph (c) of this paragraph, with respect to prenotified price increases on a product, product line, service, or service line of less than \$3 million.

(m) Make decisions and issue orders with respect to requests for reconsideration of initial decisions made and orders issued pursuant to the authority delegated by subparagraphs (d), (e), (i) or (k) of this paragraph except in such cases at the Director of the Cost of Living Council or his delegate may otherwise direct.

(n) Maintain records and provide periodic reports to the Director of the Cost of Living Council concerning the conduct of price stabilization activities performed pursuant to this order.

(o) Disseminate public information with respect to price stabilization matters and respond to requests for public disclosure of records relating to price stabilization in accordance with Part 102 of Title 6, Code of Federal Regulations.

2. The authority delegated by paragraph 1(a) through (f) and (i) through (o) of this order does not extend to institutional and non-institutional providers of health services who are subject to Subpart O of Part 150 of Title 6, Code of Federal Regulations.

3. The Secretary may redelegate to the Commissioner of Internal Revenue and provide for further redelegation to any official of the Internal Revenue Service any authority under this order, and may utilize any service of any other agency, federal or state, as may be available and appropriate.

4. Officials exercising the authority delegated by this order or redelegated pursuant thereto shall be governed by the regulations and ruling of the Cost of Living Council and by the policies, procedures, and controls prescribed by the Cost of Living Council.

5. The order is effective August 13, 1973. Issued in Washington, D.C., on August 9, 1973.

Cost of Living Council Order No. 37, Delegation of Authority, August 10, 1973 (38 F.R. 21836, August 13, 1973).

REDELEGATION OF AUTHORITY BY THE TREASURY DEPARTMENT TO THE COMMISSIONER OF INTERNAL REVENUE

DELEGATION OF AUTHORITY TO PERFORM PRICE STABILIZATION FUNCTIONS

Pursuant to the authority vested in me as Secretary of the Treasury, including the authority in Reorganization Plan No. 26 of 1950, and the delegation of authority to me as Secretary of the Treasury by Cost of Living Council Order No. 37, it is ordered that:

1. The authority to perform all functions delegated to me by Cost of Living Council Order No. 37, is hereby redelegated to the Commissioner of Internal Revenue. This authority is to be exercised subject to the policy guidance and discretion of the Director of the Cost of Living Council.

2. The Commissioner may redelegate this authority to any official of the Internal Revenue Service.

This Order shall become effective upon issuance. [Dated August 9, 1973, and issued August 13, 1973.]

Treasury Department Order No. 150-82, Delegation of Authority, August 10, 1973 (38 F.R. xxxxx, August xx, 1973).

REDELEGATION OF AUTHORITY BY THE COMMISSIONER OF INTERNAL REVENUE

DELEGATION OF AUTHORITY IMPLEMENTING INITIAL PHASE IV FUNCTIONS

1. The authority granted the Commissioner of Internal Revenue by Cost of Living Council Order No. 37 [48,202] and Treasury Department Order No. 150-82 [48,203] is hereby redelegated to the Assistant Commissioner (Stabilization), Regional Commissioners, Assistant Regional Commissioners (Stabilization), and District Directors and also to Key District Directors to exercise in and for the related Associate Districts. Key District Directors will exercise functional supervision over Stabilization activities in related Associate Districts.

*Key districts**Associate districts*

Boston

 Brooklyn
 Buffalo
 Hartford
 Manhattan
 Baltimore
 Richmond
 Newark
 Philadelphia
 Pittsburgh
 Atlanta
 Jacksonville
 Greensboro
 Nashville
 Cincinnati
 Indianapolis
 Cleveland
 Detroit
 Chicago
 St. Louis
 Des Moines
 St. Paul

 Milwaukee
 Austin

 Dallas
 Oklahoma City

 Los Angeles

 San Francisco

 Seattle

Augusta
 Burlington
 Portsmouth
 None
 Albany
 Providence
 None
 None
 None
 None
 Wilmington
 None
 Birmingham
 None
 Columbia
 Jackson
 Louisville
 None
 Parkersburg
 None
 None
 Springfield
 Omaha
 Aberdeen
 Fargo
 None
 New Orleans

 Albuquerque
 Cheyenne
 Denver
 Little Rock
 Wichita
 Honolulu
 Phoenix
 Reno
 Salt Lake City
 Anchorage
 Boise
 Helena
 Portland

2. This authority may be redelegated by the Assistant Commissioner (Stabilization), Regional Commissioners, Assistant Regional Commissioners (Stabilization) and District Directors and may not be further redelegated.

IRS Delegation Order No. 140, August 13, 1973 (38 F.R. 22420, August 20, 1973).

DELEGATION OF AUTHORITY FROM THE CLC TO THE GENERAL SERVICES ADMINISTRATOR; SECRETARIES OF THE MILITARY DEPARTMENTS AND THE SECRETARY OF DEFENSE

DELEGATION OF AUTHORITY TO RENEGOTIATE GOVERNMENT CONSTRUCTION CONTRACTS

For the purpose of (i) preventing windfall profits resulting from a reduction in the wage and salary level of employees of firms in the construction industry by action of the Construction Industry Stabilization Committee (CISC) or the Cost of Living Council (CLC), (ii) implementing § 150.453 of the Cost of Living Council regulations, (or any subsequent republication thereof, however designated), and acting pursuant to the Economic Stabilization Act of 1970, as amended, and the authority delegated to me by Executive Order 11695 and Cost of Living Council Order No. 14, I hereby delegate to the Administrator of the General Services Administration with respect to civilian executive agencies, and the Secretaries of the military departments and the Secretary of Defense with respect to the Department of Defense authority to:

(1) Require price redetermination of each fixed price construction contract of more than \$500,000 which is affected by a wage and salary reduction caused by action of the CISC or CLC;

(2) Require that, after August 12, 1973, each successful offeror on a fixed price construction contract of more than \$500,000 provide the government with such information during the life of that contract as is necessary to determine whether windfall profits have or will accrue from a wage or salary reduction caused by the CISC or CLC, and to make such arrangements with his subcontractors, regardless of tier, as may be necessary to insure that the information is provided;

(3) Prescribe in the Federal Procurement Regulations, and applicable regulations of the Department of Defense such rules and procedures as are necessary to carry out the purpose of this delegation; and

(4) Redelagate to any Federal agency of the United States any authority under this delegation.

Issued in Washington, D.C. on August 10, 1973.

Cost of Living Council Order No. 38, Delegation of Authority, August 13, 1973 (38 F.R. 22180, August 16, 1973).

DELEGATION OF AUTHORITY FROM THE CLC TO THE ADMINISTRATOR FOR PAY BOARD MATTERS

Pursuant to the authority vested in me as Director of the Cost of Living Council by Cost of Living Council Order No. 14, it is hereby ordered as follows:

1. (a) There is hereby delegated to the Administrator for Pay Board Matters authority to:

(i) Process, consider, decide and issue decisions and orders with respect to actions pending before the Pay Board on February 28, 1973, including exception requests, pay challenges, executive compensation submissions, appeals from Internal Revenue Service adverse actions, and related matters, which were filed with the Pay Board or its delegate on or before January 10, 1973, and which involve pay adjustments, or other matters appropriate for Pay Board action, to be effective on or before January 10, 1973; and

(ii) Rule on any request for review or reconsideration of a decision issued by the Pay Board prior to January 11, 1973, or pursuant to the interim authority delegated to the Chairman of the Pay Board by Cost of Living Council Order No. 17.

(b) The actions referred to in subparagraph (a) of this paragraph shall be processed, acted on, and decided in accordance with Pay Board procedures, policies, rulings, and regulations in effect on January 10, 1973. Actions pursuant to this delegation shall be taken in the name of the Administrator for Pay Board Matters and shall be reviewable only by the Administrator for Pay Board Matters under the procedures provided by Pay Board regulations in effect on January 10, 1973, with respect to actions taken in the name of the Chairman of the Pay Board.

2. (a) There is hereby delegated to the Administrator for Phase III Matters authority to:

(i) Process, consider, decide, and issue decisions and orders with respect to individual cases involving pay adjustments presented to the Cost of Living Council under the policies, rulings, and regulations of the Council in effect from January 11, 1973, through July 11, 1973; and

(ii) Rule on requests for review or reconsideration of initial decisions made pursuant to this subparagraph.

(b) The authority delegated pursuant to this paragraph shall extend only to matters in which a submission was received by the Council or its delegate prior to July 12, 1973, relating to a pay adjustment to be effective on or before July 11, 1973. For purposes of this subparagraph, the furnishing of information concerning a proposed or negotiated pay adjustment, in response to a request by the Council, shall not be considered a submission to the Council if a challenge to such pay adjustment was not issued by the Council prior to July 12, 1973.

3. There is hereby delegated to the Counselor to the Director authority to:

(a) Process, consider, decide, and issue decisions and orders with respect to individual cases involving pay adjustments affecting employees of State or local governments, presented to the Cost of Living Council under the policies, rulings, and regulations of the Council in effect on and after January 11, 1973; and

(b) Rule on requests for review or reconsideration of initial decisions made pursuant to subparagraph (a) of this paragraph.

4. (a) There is delegated to the Administrator, Office of Wage Stabilization, authority to:

(i) Issue challenges with respect to pay adjustments as provided in Cost of Living Council Regulations;

(ii) Process, consider, decide, and issue decisions and orders with respect to individual cases involving pay adjustments presented to the Cost of Living Council under the policies, rulings, and regulations of the Council in effect on and after July 12, 1973;

(iii) Rule on requests for review or reconsideration of initial decisions made pursuant to this paragraph;

(iv) Monitor pay adjustments.

(b) The authority delegated pursuant to this paragraph does not include any authority which has been delegated to the Administrator for Pay Board Matters, the Administrator for Phase III Matters, or the Counselor to the Director pursuant to paragraph (1), (2), or (3) of this Order.

(c) In the consideration of any pay adjustment under this paragraph, the Administrator, Office of Wage Stabilization, shall, except as otherwise directed by the Director or his delegate, take final action only after consulting with and receiving recommendations as to disposition from the appropriate tripartite industry wage and salary committee as heretofore or hereafter may be established by the Council.

5. An official of the Cost of Living Council exercising authority pursuant to this Order may solicit and receive the advice and recommendations of any appropriate individual, group, panel, or committee.

6. An official of the Cost of Living Council exercising authority pursuant to this Order may request information and conduct hearings with respect to functions delegated in this Order.

7. The authority delegated in this Order does not include any authority which has been delegated to the Construction Industry Stabilization Committee pursuant to Cost of Living Council Orders No. 16 and 20, or which may subsequently be delegated to the Construction Industry Stabilization Committee.

8. Each official to whom authority is delegated by this Order may redelegate that authority.

9. In exercising the authority delegated by this Order or redelegated pursuant thereto, officials of the Cost of Living Council shall be governed by the regulations and rulings of the Cost of Living Council and by the policies, procedures, and controls prescribed by the Director or his delegate.

10. Actions taken by officials of the Cost of Living Council on review or reconsideration pursuant to this Order are administratively final. Review of these actions may be sought in the appropriate Federal district court pursuant to section 211 of the Economic Stabilization Act of 1970, as amended.

11. Cost of Living Council Order No. 21 and paragraph (4) of Cost of Living Council Order No. 25 are hereby superseded.

12. This Order is effective July 12, 1973.

Cost of Living Council Order No. 40. August 24, 1973 (38 F.R. 22909, August 24, 1973.

DELEGATION OF AUTHORITY FROM THE CLC TO THE ADMINISTRATOR, OFFICE OF PRICE STABILIZATION

Pursuant to the authority vested in me as Director of the Cost of Living Council by Cost of Living Council Order Nos. 14 and 29, it is hereby ordered as follows:

1. There is delegated to the Administrator, Office of Price Stabilization, subject to the general policy guidance of and in coordination with the Director of the Cost of Living Council, or his delegate, authority to:

(a) Make decisions and issue orders with respect to prenotified price increases and all other filings requiring decisions except in those cases for which specific authority to do so is delegated to the Commissioner of Internal Revenue, the Administrator, Office of Health, or the Administrator, Office of Food.

(b) Make decisions and issue orders with respect to individual requests for exceptions from firms or for class exceptions, except in those cases for which specific authority to do so is delegated to the Commissioner of Internal Revenue, the Administrator, Office of Health, or the Administrator, Office of Food.

(c) Make decisions and issue order with respect to all requests for reconsideration of adverse actions taken by the Cost of Living Council or the Internal Revenue Service except with respect to those cases for which specific authority to

do so is delegated to the Commissioner of Internal Revenue, the Administrator, Office of Health, or the Administrator, Office of Food.

(d) Request information and conduct hearings with respect to functions delegated in this paragraph.

2. Paragraphs 1 and 2 of Cost of Living Council Order No. 25 are hereby revoked.

3. The Administrator, Office of Price Stabilization may redelegate to personnel within the Office of Price Stabilization any authority delegated to him by this order.

4. In exercising the authority delegated by this order or redelegated pursuant thereto officials of the Cost of Living Council shall be governed by the regulations and rulings of the Cost of Living Council and by the policies, procedures, and controls prescribed by the Director of the Cost of Living Council, or his delegate.

5. Actions taken by the Administrator, Office of Price Stabilization, under paragraph 1(c) of this order, are administratively final. Review of these actions may be sought in the appropriate Federal district court pursuant to section 211 of the Economic Stabilization Act of 1970, as amended (Public Law 92-210, 85 Stat. 744).

6. This order is effective August 13, 1973.

Cost of Living Council Order No. 41, September 17, 1973.

DELEGATION OF AUTHORITY FROM CLC TO ADMINISTRATOR, OFFICE OF FOOD

Pursuant to the authority vested in me as Director of the Cost of Living Council by Cost of Living Council Order Nos. 14 and 29, it is hereby ordered as follows:

1. There is delegated to the Administrator, Office of Food, subject to the general policy guidance of and in coordination with the Director of the Cost of Living Council, or his delegate, authority to:

(a) Make decisions and issue orders with respect to prenotified price increases and all other filings from firms engaged in food manufacturing, food service activities, food wholesaling, or food retailing requiring decisions;

(b) Make decisions and issue orders with respect to individual requests for exceptions from firms engaged in food manufacturing, food service activities, food wholesaling, or food retailing or for class exceptions pertaining thereto;

(c) Make decisions and issue orders with respect to all requests for reconsideration of adverse actions taken by the Cost of Living Council or the Internal Revenue Service with respect to firms engaged in food manufacturing, food service activities, food wholesaling, or food retailing; and

(d) Request information and conduct hearings with respect to functions delegated in this paragraph.

2. The Administrator, Office of Food, may redelegate to personnel within the Office of Food any authority delegated to him by this order.

3. In exercising the authority delegated by this order or redelegated pursuant thereto officials of the Cost of Living Council shall be governed by the regulations and rulings of the Cost of Living Council and by the policies, procedures, and controls prescribed by the Director of the Cost of Living Council, or his delegate.

4. Actions taken by the Administrator, Office of Food, under paragraph 1(c) of this order, are administratively final. Review of these actions may be sought in the appropriate Federal district court pursuant to section 211 of the Economic Stabilization Act of 1970, as amended (Public Law 92-210, 85 Stat. 744).

5. This order is effective August 13, 1973.

Cost of Living Council Order No. 41, September 17, 1973.

MEMORANDUM OF AGREEMENT BETWEEN CLC AND IRS

ECONOMIC STABILIZATION PROGRAM,
COST OF LIVING COUNCIL,
Washington, D.C., August 13, 1973.

To: Edward Preston, Assistant Commissioner, Stabilization, Internal Revenue Service.

From: Charles Emley, Associate Director, Operations, Cost of Living Council.

Subject: Phase IV Operating Responsibilities.

The purpose of this memorandum is to establish an understanding of the working relationship between the Internal Revenue Service (IRS) and the Cost

of Living Council (CLC) in Phase IV. This understanding builds upon the discussions we have been having and has culminated in the proposed memorandum of understanding discussed among you, Ray Harless, James McLane and me last Wednesday. Further, it is intended to be consistent with the delegation order signed by Secretary Shultz (CLC Order 37) and the procedural regulations published for Phase IV.

Specifically, this memorandum distinguishes the operational responsibilities of the IRS in price stabilization from those retained by CLC; delineates the program relationships between IRS and CLC components that will prevail during Phase IV; and contains broad guidelines for price monitoring review of official filings, conduct of compliance actions, granting of exceptions, and conduct of public information activities authorized under the delegation.

For the purpose of implementing this memorandum and carrying out our respective price stabilization functions, the IRS office of the Assistant Commissioner, Stabilization shall establish and maintain an operational line of communications with the office of the CLC Associate Director, Operations. Further detailed operating procedures for these functions will be prepared and jointly agreed upon by our offices.

The following material is organized into nine sections which discuss our mutual responsibilities for Phase IV. These responsibilities can be modified from time to time as operating and programmatic efficiencies dictate. The modifications must be of a mutually agreeable nature.

I. SERVICE AND COMPLIANCE CENTERS

A. The IRS National headquarters in Washington, D.C. will establish and maintain a field network for the purpose of coordination and performance of the matters set forth in this memorandum. The field network will consist of regional offices, 29 key district offices, and other local and district offices. Key districts, designated by the Commissioner of IRS, will be responsible for all operational activities which are delegated from IRS National headquarters to the field network and which are undertaken within the jurisdiction of the key district office.

B. IRS will determine personnel skill levels, grades and field distribution required and provide a minimum of 3,000 positions by September 1, to perform economic stabilization activities. IRS will submit a budget for review and approval of CLC to be included in the consolidated Economic Stabilization Program (ESP) budget submitted by CLC.

II. OFFICIAL FILINGS

A. General

1. IRS will instruct all price Category I and II firms covered by the Economic Stabilization Program during Phase IV that all official filings and reports are to be made with the IRS Key District in which their corporate headquarters are domiciled. Exceptions to this general rule are insurers who will file with the IRS, Washington, D.C. and institutional and non-institutional providers of health services who will file pursuant to Section VII.

2. Except as otherwise directed by CLC, all orders and official responses to filings or reports made with the IRS Key Districts will be issued on behalf of the CLC by the IRS Key Districts.

3. In those cases where CLC reserves the right of concurrence, CLC's decision will be final and binding.

4. IRS Key Districts will seek to assure that firms in Category I and II comply with the filing requirements under the regulations and that such filings are accurately and properly completed.

5. As necessary, IRS Key Districts will:

- a. Require firms to submit additional documentation in order to accurately complete their filing;
- b. Suspend the running of designated time limitations in order to enable it to obtain the necessary additional documentation.

B. Prenotifications

1. IRS Key Districts will receive, process and review within the time periods required by the regulations, all filings, including delegated CLC-22 filings and related Schedules R, T, and C in accordance with operating procedures;

2. IRS Key Districts will make decisions and issue orders with respect to all requests for prenotified price increases pursuant to Part 150 of Title 6, Code of Federal Regulations, except the following:

- a. Precedent Setting cases as defined in Section III B 3 ;
 - b. Product, product line, service or service line increases of \$10 million or more ;
 - c. Product, product line, service or service line increases of \$5 million or more which are also price increases of 5% or more.
3. Notwithstanding Section III B 2, IRS Key Districts will forward to CLC for decision, with time of receipt, those prenotifications as CLC may direct and precedent setting prenotification which are generally described as follows:
- a. Those likely to have a substantial impact on the economy—e.g. ripple effect ;
 - b. Those which represent a departure from unusual operating procedure due to an anomaly in an industry ;
 - c. Those which present a special problem with respect to the ESP regulations.
4. With respect to prenotifications which IRS Key Districts forward to CLC, the Districts will perfect (prescreen) the filing and forward it, with time of receipt, to the Office of Operations, CLC. After CLC processes the case, the IRS Key District will issue such order as CLC may direct.

C. *Special filings*

- 1. IRS Key Districts will perfect (prescreen) the filings of requests for *volatile pricing authority*, and forward them to the Office of Operations, CLC and will inform the Key District of decisions on such requests and the Key District will issue an order implementing the decision.
- 2. IRS Key Districts will receive, process and make decisions on all reports supporting *loss/low profit* line pricing provisions of Subpart J of Part 150, Title 6, Code of Federal Regulations.
- 3. IRS Key Districts will receive, process and make decisions on quarterly reports regarding *new products and new services* pursuant to Section 150.103 of Title 6, Code of Federal Regulations.
- 4. IRS Key Districts will receive, process and make decisions on *merchandise pricing plans* submitted by wholesalers and retailers pursuant to Subpart K of Part 150, Title 6, Code of Federal Regulations.
- 5. IRS Key Districts will receive, process and make decisions on *modification of prenotification* requirements filed pursuant to Section 150.151(b) (2)(iv) (A) of Title 6, Code of Federal Regulations by firms having \$100 million or less in annual sales or revenues within an industrial group identified by a two-digit Standard Industrial Classification Code.

D. *Exception requests*

- 1. IRS Key Districts will receive and process individual requests for exception in accordance with criteria established in the field operating procedures under development.
- 2. IRS Key Districts will make decisions and issue orders with respect to exception requests from all industries except class exception requests and as directed by CLC.
- 3. With respect to exception requests which IRS Key Districts will forward to CLC within five days of filing date, the Districts will perfect (prescreen) each request and send it to the Office of Operations, CLC. After CLC processes the case the IRS Key District will issue such orders on behalf of the CLC as it may direct.

E. *All other reports*

- 1. IRS Key Districts will seek to assure that firms comply with the reporting requirements of the regulations :
- 2. IRS Key Districts will analyze these reports to assure the following :
 - a. That they are accurate and complete ;
 - b. That specified data from such reports has been entered into the CLC Economic Stabilization Program data base ; and
 - c. That violations are identified and that appropriate corrective action is taken.

III. COMPLIANCE ACTIVITIES

A. *Investigations and surveys*

IRS is responsible for assuring compliance with the Phase IV regulations through review of official filings and investigations of the activities and records of individual firms. IRS will set their priorities for the investigation of the

pricing behavior of individual firms. The Office of Operations, CLC will be routinely advised of enforcement activity. CLC may direct and must concur in all regional and national investigations and surveys.

B. Remedial actions

IRS Key District will notify firms of probable violations of the regulations and orders governing price stabilization matters within their respective jurisdiction, issue remedial orders, monitor remedial activities, and approve compliance actions with respect thereto, in accordance with procedural regulations. Regular reporting of these activities will be made to the Office of Operations, CLC.

IV. LEGAL MATTERS

A. General

As between the parties hereto, CLC is the final authority on all questions of law with respect to price matters and will, though the Office of General Counsel, CLC, provide legal advice and assistance to IRS on price stabilization matters.

B. Regulations

CLC will formulate and issue substantive and procedural regulations governing price stabilization matters.

C. Rulings

The General Counsel of CLC will have exclusive authority to issue legal opinions and rulings with respect to price stabilization regulations, decisions, and orders.

D. Interpretations for individual firms

IRS Key Districts will issue to individual firms written interpretations of the regulations governing price stabilization matters. Unless the matters contained therein have been previously established in writing by CLC, IRS written interpretations must have the prior approval of CLC.

E. Civil penalties

IRS Key Districts will compromise and collect civil penalties for violations of price stabilization regulations and orders by price category III firms and for late filings of required price stabilization reports by price category I and price category II firms. The General Counsel of CLC will compromise and collect all other civil penalties.

F. Litigation

The General Counsel of CLC will have exclusive responsibility for communicating with and making recommendations to the Department of Justice with respect to litigation, the prosecution of violations, and the handling of all other court proceedings and the handling of all other court proceedings relating to the Economic Stabilization Program.

G. Subpoenas

IRS Key District will, as necessary, sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths, all in accordance with Section 206 of the Economic Stabilization Act of 1970, as amended, with respect to functions to be performed by his District Office in accordance with this memorandum. Concurrence of the General Counsel of CLC will be obtained before seeking judicial enforcement of a subpoena.

V. REQUESTS FOR RECONSIDERATION OF IRS DECISIONS

Requests for reconsideration of IRS decisions adverse to a firm including, but not limited to, decisions with regard to prenotifications, loss/low profit status, new products and new services, merchandise pricing plans, exception requests, remedial orders or actions, and interpretations of the regulations will be processed, reviewed and decided upon in accordance with the following guidelines:

A. Prenotifications

Reconsideration requests on prenotification decisions will be received and processed by the IRS Key Districts. IRS will make decisions in cases where the request is for a price increase of less than \$3 million. Cases with greater dollar

impact will be forwarded to the Office of Operations, CLC, together with a recommendation for CLC decision.

B. All other requests for reconsideration

IRS Key Districts will receive and process all other requests for reconsideration and will immediately forward the following to the Office of Operations, CLC :

1. By facsimile, a summary of the request for reconsideration ; and
2. By mail, a copy of the formal request for reconsideration.

CLC will advise the Key District of these cases in which it desires to make the decision, and the Key District will forward the case file directly to the Office of Operations, CLC. After CLC makes the decision, the IRS Key District will issue such orders on behalf of the CLC as it may direct. In those cases in which CLC decides not to exercise authority, the Key District will make the decision and issue the order in accordance with procedural regulations.

VI. INSURANCE

All processing and decisions regarding the insurance industry or individual insurance companies will be made by CLC. The IRS will issue such orders on behalf of CLC as it may direct.

VII. IRS HEALTH RESPONSIBILITIES

All IRS responsibility with respect to institutional and non-institutional providers of health services will be transferred to CLC within 90 to 120 days from the date of this memorandum. IRS under the terms of the delegation of authority (CLC Order 37), retain authority to conduct investigations to determine compliance by L.P. and N.I.P. of health services during Phase IV. The procedures for this transfer, including filing requirements will be detailed by separate regulations and documents to be prepared by CLC.

VIII. REPORTING

CLC, in cooperation with IRS will design and implement a management information system to fulfill the following objectives :

- A. To furnish timely information on prenotifications, reconsiderations and exception requests received by IRS units ;
- B. To furnish summary information on all other filings received by IRS ;
- C. To furnish periodic reports on IRS case processing in order to facilitate case management control ;
- D. To furnish regular information on compliance actions and investigations pursued by IRS ;
- E. To furnish a base of information on price stabilization to meet public information needs.

The design of the system under direct project leadership of the CLC Office of Systems and Procedures, will incorporate the following general features.

A. IRS will furnish to Office of Operations, CLC a record of all orders and decisions made by IRS with respect to prenotifications, volatile pricing authorizations, allowances for low profit firms, prices of new products, reconsiderations of other decisions and grants of exception. Such a record will include an indication of identity of the business firm, or entity to which the decision or order applies, the effective time of its application, the size of the price increase, violation or allowance involved, and a recapitulation of previous actions against the firm.

B. IRS will furnish to Office of Operations, CLC, a similar record of all decisions and orders involving assessment of a penalty on violators of price regulations.

C. IRS will, on a weekly basis, furnish Office of Operations, CLC, a summary highlights report, including a synopsis and analysis of all price monitoring results, compliance actions, and investigations pursued by IRS. The format and frequency of this report is to be spelled out in the operating procedures under development.

D. The timing, number and format of these reports will be specified in the detailed design specifications now underway.

IX. PUBLIC INFORMATION ACTIVITIES

The IRS District offices will answer all inquiries in accordance with CLC public disclosure of information regulations. All appeals from initial denials of requests for information will be forwarded to the Cost of Living Council.

The IRS District offices will provide public information in accordance with procedures to be jointly established by CLC and IRS Offices of Public Affairs.

AMALGAMATED MEAT CUTTERS and BUTCHER WORKMEN OF NORTH
AMERICA, AFL-CIO, Plaintiffs,

v.

JOHN B. CONNALLY, Individually; and as Chairman of the COST OF LIVING
COUNCIL, et. al., Defendants,

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1833-71

Albert Gore, Chicago, Illinois, with whom Jerry Anker, Washington, D.C., and Solomon J. Hirsch, Chicago, Illinois were on the papers, presented the argument for plaintiffs.

David J. Anderson, Department of Justice, with whom L. Patrick Gray III, Assistant Attorney General Civil Division; Thomas A. Flannery, United States Attorney; and Harland F. Feathers and Stuart E. Schiffer, Department of Justice, were on the papers, presented the argument for federal defendants.

Other appearances: Charles A. Horsky, Washington, D.C., for defendant Swift and Company.

Robert J. Corber, Washington, D.C., for defendant Armour & Co.

Richard J. Wertheimer, Washington, D.C., for defendant Hygrade Food Products Corporation.

Lawrence Wood, Washington, D.C., for defendants Wilson Certified Foods, Wilson-Sinclair and Wilson Beef & Lamb Co.

Stanley R. Strauss, Washington, D.C., for defendant Cudahy Packing Co.

Before LEVENTHAL, Circuit Judge, ROBINSON AND RICHEY, District Judges.

OPINION IN SUPPORT OF ORDER DENYING INJUNCTION

LEVENTHAL, *Circuit Judge*: In this litigation Plaintiff Union, the Amalgamated Meat Cutters¹ suing on its own behalf and on behalf of its affiliated local unions, attacks the constitutionality of the Economic Stabilization Act of 1970 (Act²), contained in Title II as Public Law 91-379, 84 Stat. 799, and appended as Annex A, and governmental actions thereunder.

Two different actions are consolidated in the complaint. Count II seeks to require the major meat packing companies³ to perform their obligations, under their 1970 collective bargaining agreements with the Union, to grant a general wage increase of twenty-five cents an hour effective September 6, 1971. The Union asserts this wage increase was agreed upon in April 1970 after long and difficult negotiations, that the parties carefully weighed alternative benefits and concessions before agreeing on the specific provisions, and that its inclusion was decisive in obtaining the Union's acceptance. The employers respond that the implementation of the wage increase obligation would violate Executive Order 11615, 36 F.R. 15727, promulgated by President Nixon August 15, 1971, appended as Annex B. This Executive Order, *Stabilization of Prices, Rents, Wages and Salaries*, establishes a 90-day price-wage freeze, a requirement that "prices, rents, wages and salaries shall be stabilized for a period of 90 days" at levels no greater than the highest rates pertaining to a substantial volume of actual transactions by the seller of commodities or services involved in a specified base period preceding August 15. The Union's position is that this defense is insufficient as a matter of law because the Act is unconstitutional and the Executive Order invalid.

The broader aspect of the controversy before us appears in Count I of the complaint, an action brought against John B. Connally, who as Secretary of the Treasury is Chairman of the Cost of Living Council, and the other officials constituting the Council. In Executive Order 11615 President Nixon established the Cost of Living Council "which shall act as an agency of the United States," specified that it shall be composed of certain designated officials as members⁴ and "delegated to the Council all the powers conferred on the President by the Economic Stabilization Act of 1970."

See footnotes at end of article.

In Count I the Union seeks a declaratory judgment that the Act and Executive Order 11615 are illegal and unconstitutional, and also an injunction against the officials named as defendants, individually and as members of the Council, restraining and enjoining them from administering or giving any force or effect to the Executive Order and the Act. In view of the prayer for injunction a three-judge District Court was convened October 3, 1971, pursuant to 28 U.S.C. §§ 2282, 2284. We heard oral argument October 8, 1971 on the Union's motion for preliminary injunction. The court rejects the Union's contention that the Act and Executive Order are invalid on their face, for the reasons set forth below.

A. GOVERNMENT'S CONTENTION OF ADEQUACY OF REMEDY AT LAW

The federal defendants raise a threshold claim that the Union's prayer for an injunction must be dismissed because it has an adequate remedy at law. This contention would not remove the litigation, since the Union could maintain action against the employers and challenge the constitutionality of the Act and order presented as a defense. However the jurisdiction of this three-judge district court depends on both a substantial constitutional question and equity jurisdiction of the action for injunction. We conclude we have requisite equity jurisdiction.

While under familiar doctrine, a litigant's claim to injunctive relief requires a showing of irreparable injury and inadequacy of legal remedies, these are "practical terms." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 507 (1959). The mere fact that a court may ultimately decide in the exercise of its discretion, including balance of conveniences, that an injunction should not be issued—even assuming for purpose of decision that plaintiff has a valid claim on the merits—does not negate equity jurisdiction. Where the action seeks to enjoin enforcement of a Federal statute on the ground of unconstitutionality, this would not negate the jurisdiction of a statutory three-judge district court. Broadly speaking such actions to contest a statute's validity, like actions to review Federal administrative action,⁵ may be maintained by a proceeding for injunction or declaratory judgment or both.

Even where a declaratory judgment is available, the three-judge district court has equity jurisdiction so long as there is a reasonable possibility that it may approve of an injunction in order to give complete protection to constitutional rights.⁶ Relegating the Union to the remedies contemplated by the Government would involve a multiplicity of litigation. Multiple damage actions, or their declaratory equivalent, would be required by this Union, and possibly also by its affiliates, not only against the defendant meat packers, but also against various employers in other industries—retail foods; fur and leather; food-processing; poultry and seafood; canning; and miscellaneous non-food industries. It is alleged that the Union and its affiliates have entered into collective bargaining agreements with employers, providing for increases scheduled to take effect during the 90-day freeze period of Executive Order 11615, affecting in excess of 150,000 employees.

There is palpably a significant difference to these thousands of employees between the receipt of these increases at the times agreed, available to meet any obligations programmed on their receipt, and any subsequent declaration of right. We need not pursue the question whether a court might have reason to withhold injunctive relief, particularly a preliminary injunction, even though it had been convinced of the merit of the Union's substantive claims. As we have indicated we do not accept the Union's position on the merits. But for present purposes we are concerned with a threshold objection, that the lack of equity jurisdiction precludes our even giving consideration to the merits of the Union's position. That contention we cannot accept. Applying familiar principles, the Union's action, seeking to prevent hardship to its members and multiplicity of litigation, clearly comes within the court's equity jurisdiction.

B. CLAIM OF UNCONSTITUTIONALITY OF ACT AS DELEGATION OF LEGISLATIVE POWER

The main claim of the Union is that the Act unconstitutionally delegates legislative power to the President, in violation of the general constitutional principle of the Separation of Powers, and in contravention of Article I, Section I of the Constitution, which provides: "All legislative Powers herein granted shall be vested in a Congress of the United States."

⁵ See footnotes at end of article.

The Union's position is that the Act's broad authority to the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries" vests "unbridled legislative power in the President," a "naked grant of authority" to determine whether they "will be controlled, and the scope, manner and timing of those controls."

The constitutional question thus put to this court is novel and fraught with difficulty, for we cannot blink the broad discretion given to the President by the Act.

The matter has been argued to us on principle and precedent. The divergences in the principles perceived by the litigants are matched by divergences in the precedents they summon. The Government cites numerous authorities but relies most heavily on *Yakus v. United States*, 321, U.S. 414 (1944), sustaining the grant in the Emergency Price Control Act of 1942 of broad price-fixing authority. The Union particularly invokes the 1935 decisions in *Schechter Corp. v. United States*, 295 U.S. 495, and *Panama Refining Co. v. Ryan*, 293 U.S. 388, holding invalid provisions of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195.

We are of the view that the *Yakus* ruling and principles there applied provide the more meaningful guidance for the novel problem at hand, and that this constitutional assault cannot be sustained. We review the several interrelated considerations that lead us to this conclusion.

1. *Permissibility of delegation of legislative power, within limits*

We may usefully begin with the modest observation that the Constitution does not forbid every delegation of "legislative" power. This was recognized explicitly at least as long ago as *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 305 (1933), where Justice Cardozo stated that the tariff provision under consideration involved "in substance a delegation, though a permissible one, of the legislative power."

There may thus be added to the outworn doctrines interred in the cause of wisdom the conception developed in *Field v. Clark*, 143 U.S. 649, 692-93 (1892), which centers the validity of a delegation by Congress to the President on whether he "was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." That officials may lawfully be given for greater authority than the power to recognize a triggering condition was recognized within twenty years in the famous *Grimaud* case where a unanimous Court "admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations." There is no analytical difference, no difference in kind, between the legislative function—of prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority conferred by the legislature. The problem is one of limits.

An agency assigned to a task has its freedom of action circumscribed not only by the constitutional limitations that bind Congress but by the perimeters described by the legislature as hedgerows defining areas open to the agency. The question is the extent to which the Constitution limits a legislature that may think it proper and needful to give the agency broad flexibility to cope with the conditions it encounters.

2. *Governing concepts of necessary flexibility and accountability for conformance to "intelligible principle" and legislative will*

The legislative power granted to Congress by the Constitution includes the power to avail itself of "the necessary resources of flexibility and practicality . . . to perform its function."⁵ The spaciousness of the legislative authority is underscored by the following quotations from the *Yakus* opinion voicing the elements of the applicable principles: "The Constitution as a continuously operative charter of the government does not demand the impossible or the impracticable." Congress is free to delegate legislative authority provided it has exercised "the essentials of the legislative function"—of determining the basic legislative policy and formulating a rule of conduct—held satisfied by "the rule, with penal sanctions, that prices shall not be greater than those fixed by maximum price regulations which conform to standards and will tend to further the policy which Congress has established." The key question is not answered by noting that the authority delegated is broad, or broader than Congress might have selected if it had chosen to operate within a narrower range. The issue

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is whether the legislative description of the task assigned "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will."⁹

The *Yakus* ruling of Chief Justice Stone carries forward the doctrine earlier articulated by Chief Justice Taft in *Hampton* that there is no forbidden delegation of legislative power "if Congress shall lay down by legislative act an intelligible principle" to which the official or agency must conform.¹⁰

Concepts of control and accountability define the constitutional requirement. The principle permitting a delegation of legislative power, if there has been sufficient demarcation of the field to permit a judgment whether the agency has kept within the legislative will, establishes a principle of accountability under which compatibility with the legislative design may be ascertained not only by Congress but by the courts and the public.¹¹ That principle was conjoined in *Yakus* with a recognition that the burden is on the party who assails the legislature's choice of means for effecting its purpose, a burden that is met "[o]nly if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed."¹²

These doctrines have been applied to sustain legislation that delegated broad authority indeed in order to assure requisite flexibility to the officials or agencies designated to discharge the tasks assigned by the Congress. *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932) (permitting consolidation of carriers when "in the public interest"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) ("just and reasonable" rates for natural gas); *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943) (licensing of radio communications "as public convenience, interest or necessity requires"); *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (recovery of "excessive profits" earned on war contracts). But perhaps the broadest delegation yet sustained and the one closest to the case before us came in *Yakus*, for the ultimate standard in the 1942 statute was only that the maximum prices be "generally fair and equitable."

3. *Standards of Act are sufficient, in context of history, to permit court to ascertain that 90-day "freeze" was in conformance to legislative will*

Under these governing concepts we cannot say that in the Act before us there is such an absence of standards that it would be impossible to ascertain whether the will of Congress has been obeyed.

In some respects, indeed, Congress has been precise in its limitations. The President is given an authority to stabilize prices and wages by § 202(a) if the Act, but not at levels less than those prevailing on May 25, 1970.

Moreover the legislation is not as vulnerable as it would have been prior to the amendment adopted earlier in 1971, under which the President is precluded by § 202(b) from singling out "a particular industry or sector of the economy upon which to impose controls" unless he makes a specific finding that wages or prices in that industry or sector have increased at a rate disproportionate to the rate for the economy as a whole. This limitation was added in reaction to the President's limited exercise of power to impose controls on union-negotiated wages in the building and construction industry. Legislative guidance is amplified in the pertinent committee report:

The Committee has serious reservations about applying the price and wage control authority to a single industry. An industry subject to price controls has no control over the price it must pay for the products of other industries. Likewise, workers subject to wage controls have no protection against a continued rise in the cost of living. For these reasons, the committee hopes the administration will adopt a voluntary system of wage-price guideposts before applying mandatory controls to any specific sector of the economy.¹³

The limitation on the President's power to take action in particular industries or sectors made this authority more narrow than the authority over prices in the 1942 legislation.¹⁴ It also clarified the will of Congress. Congress gave the President broad authority to stabilize prices, rents, wages and salaries, but in effect it contemplated that controls to achieve broad stabilization would begin with a regulation applicable to the entire economy. While the subject matter was broad, the technique was relatively confined. Confronted with the continuing

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and escalating inflation, Congress made its will relatively plain, by giving the President authority to halt the inflationary escalation with the issuance of a regulation providing across-the-board controls. The House Banking and Currency Committee Report specifically envisaged a 3-month "freeze" to get "a handle on inflation." H.R. Rep. No. 91-1330, p. 9 (Annex C).

This ascertainment of the contours of the power to "stabilize" is fortified by explicit legislative history. But even the text of the law, the starting point of analysis, must not be taken in a vacuum. In rejecting claims of invalid delegation of legislative power the Court has made clear that the standards of a statute are not to be tested in isolation¹⁵ and derive "meaningful content from the purpose of the Act, its factual background, and the statutory context."¹⁶

The historical context of the 1970 laws is emphasized in the Government's submission:¹⁷

"In enacting the legislation in question here, Congress was, of course, acting against a background of wage and price controls in two wars. The administrative practice under both of those Acts was the subject of extensive judicial interpretation and review. This substantial background of prior law and practice provides a further framework for assessing whether the Executive has stayed within the bounds authorized by Congress and provides more than adequate standards for the exercise of the authority granted by the Act."

We think this contention is sound. The context of the 1970 stabilization law includes the stabilization statutes passed in 1942, and the stabilization provisions in Title IV of the Defense Production Act of 1950,¹⁸ and the "common lore" of anti-inflationary controls established by the agency approaches and court decisions, including the probing analyses of the Emergency Court of Appeals. We do not suggest that the 1970 law was intended as or constitutes a duplicate of the earlier laws. But those laws and their implementation do provide a validating context as against the charge that the later statute stands without any indication to the agencies and officials of legislative contours and contemplation.

The approaches and decisions under the earlier laws are certainly not "frozen" as guidelines for the present law. Indeed an ordinary agency is not precluded from modifying its policies, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971). An agency "may switch rather than fight the lessons of experience." *New Castle County Airport Comm'n v. CAB*, 125 U.S.App. D.C. 268, 270, 371 F.2d 733, 735 (1966), *cert. denied*, 387 U.S. 930 (1967).

The present administration is entitled to a fresh approach. *City of Chicago v. FPC*, 128 U.S.App.D.C. 107, 115-116, 385 F.2d 629, 637-38 (1967). The fact that there are significant differences between the inflationary problems of 1970 and the inflationary problems of 1942 and 1950 provides additional reasons for differences in policies. Notwithstanding the permissible differences from prior approaches the historic context of government stabilization measures provides a starting point, within the broad contemplation of Congress, that negatives a conclusion that the whole program was set adrift without any rudder.

An undeniably prominent feature of the earlier stabilization programs was the adoption thereunder of across-the-board wage and price controls, typically with "freeze" and "hold-the-line" approaches, subject to relaxation for hardships and inequities under implementing standards. There can be no doubt that in its broad outlines the general freeze ordered by the President conforms to the legislative intention. Even a rudimentary recourse to available legal materials readily permits a court to ascertain at least to this context the contours of the legislative will and the conformance of the Executive action to it.

4. Availability of legislative stabilization purpose from legislative history

The Union challenges the thesis that the 1970 Act can be sustained by reference to the earlier stabilization laws and rulings thereunder, complaining that unlike the earlier statutes the present law is "shorthand legislation," devoid of any statement of policy or objectives, or of conditions under which action is to be taken, or findings of Congressional intent.

The Act is obviously different in its structure from the law upheld in *Yakus*, which was replete with just such statements of policy, objectives and findings. The difference is largely one of drafting style, ascribable perhaps to the circumstance that the 1942 law was proposed by the Executive, and introduced on that basis after scrutiny by the legislature's drafting staffs. This circumstance is

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not immaterial—for power may come on occasion to be granted more broadly to one who seeks it not—but it can hardly be decisive.

The *Yakus* opinion made reference to these purposes of the 1942 law, 321 U.S. at 420:

to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; . . . to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, . . . and to the Federal, State, and local governments which would result from abnormal increases in prices * * *.

While there are differences in circumstances and emphasis, the purposes relied on in *Yakus* are largely overlapping of the purposes inherent in the 1970 authority to “stabilize” prices and wages—in particular the dominant purpose of avoiding the impairment of the standard of living of consumers, wage earners and those on fixed incomes. It is not without significance that Title II of the Act of August 15, 1970, which is identified in its short title as the Economic Stabilization Act of 1970, is captioned: “Title II—*Cost of Living Stabilization*.” The situation may be diagrammed as two intersecting circles with a large overlapping sector in common.

The purposes of the 1970 law, to a considerable extent inherent in the very authority to “stabilize,” are set forth more explicitly in the Report of the House Committee on Banking and Currency which inserted these provisions into the legislative process. H.R. Rep. No. 91-1330¹⁹ (hereafter cited as House Report). We consider this Report as of such importance for the present ruling, that we append the pertinent excerpts as Annex C. Settled precedent establishes beyond any doubt that committee reports may be considered in order to ascertain the purpose of legislation.²⁰

The House Report states (at p. 10) that the provisions were proposed so that “the President will have all of the necessary weapons needed to control inflation.” And the Committee added:

No one can doubt that inflation is still on a rampage in our economy. The cost-of-living figures released on July 22 indicated that prices have risen in the first half of this year at a 6 percent annual rate. Granted that this rate of increase is insignificantly less than that experienced in the first half of last year, this is in no way provides any solace to the unemployed, the aged, and others living on fixed incomes, and the wage earner who finds his wages continually eroded by increases in the cost of living. This same inflation is responsible for the housing depression, the balance-of-payments crisis and the current liquidity squeeze.

Whether legislative purposes are to be obtained from committee reports, or are set forth in a separate section of the text of the law, is largely a matter of drafting style. Plainly the 1970 legislative purpose set forth in the House Report does not differ in material degree from the statement of legislation purpose in the 1942 legislation upheld in *Yakus*. This purpose was reiterated in debate on the 1970 Act.

5. *Delegation to President of “timing” of direct controls supported by legislative conclusions that indirect controls were insufficient medicine for “cost-push” inflation and that “stand-by” authority was necessary to permit the President to change his program and to use a freeze as a check on inflationary psychology*

We see no merit in the contention that the Act is constitutionally defective because the timing of the imposition of controls was delegated to the President.

The House Report clarifies that this delegation was not an abdication by Congress, but the product of a reasoned analysis that only such delegation as to timing would further the legislative purpose of stabilization. It states that the Act “reflects a sincere congressional willingness to do its part—and to share the consequences—in a meaningful attack on its inflation,” and that the stabilizing authority, together with the December 1969 law granting authority over credit for the purpose of preventing or controlling inflation,²¹

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will, in the opinion of your committee, provide the President with all of the tools necessary to control inflation, while at the same time providing for healthy economic growth. In this way we will not need to rely exclusively on fiscal and monetary actions which place an inordinate burden on those segments of our economy and society least able to bear them.

Congress was acting in a setting where all were agreed on the need to control inflation but opinion was sharply divided on the optimum measures for the Government to use. As of 1970, the President was heeding the counsel of that substantial body of thought which advocated concentration on fiscal and monetary measures, the so-called indirect controls. Others were advocating an "incomes policy," with readiness to resort to direct controls, on the ground that wage-cost price increases were so embedded in the structure of private decision-making that fiscal and monetary programs alone could not be successful in checking inflation without consequences of unemployment and recession that could not be tolerated.

The issue whether the delegation before us is excessive must be considered in the light of the unique situation, with the President not in accord with the conclusion of Congress as to the need or desirability of the power entrusted to him.²² Thus the Majority Leader, supporting the law, put it that the President and his advisers "are prescribing the wrong medicine for the particular inflationary virus now affecting the Nation,"²³ that restrictive fiscal and monetary policies are appropriate for combating traditional "demand-pull inflation" but the country was now beset by "cost-push inflation" for which direct controls were needed. It is not our place to review the merits of these differences. But the physician-virus metaphor is revealing. Viewing the President as a physician in charge, Congress could advise but not mandate his diagnosis. It sought in the national interest to have the right remedy available on a standby basis, if the President should wish to adopt that prescription, following his further reflection and taking into account future developments and experience.

We cannot say that this delegation was unreasoned, or a mere abdication to the President to do whatever he willed. It conferred an authority that Congress concluded, with reasons, had a substantial likelihood of being required.

Undergirding the need for delegation on timing was the Congressional acceptance of the recommendation of many economists, labor leaders, the AFL-CIO, mayors of large cities and others, who "called on the Congress to provide discretionary standby authority to the President to impose wage, price, rent, and salary controls to combat and break the back of inflation and the inflationary psychology which pervades our thinking and our economy." House Report, p. 9.

The problem of "inflationary psychology" to which the Committee referred supports the Congressional delegation on timing to the President. The success and reasonableness of government programs depends in crucial degree on their psychological ingredient. It was the contemplation of Congress that a pervasive and likely dramatic general control measure would be a convincing earnest of the breadth and depth of the commitment of the Government, and provide impetus to the Government's call to the people to endure the disappointments and grievances that are inevitable with controls of such magnitude. Congress was not required to put such constraints on the timing of the exercise of power as to jeopardize the underlying objectives.

Finally the House Report takes cognizance, in support of delegation of "timing" to the President, that Congress might not be in session when action was requisite.²⁴

The constitutional doctrine prohibiting undue delegation of legislative power takes account of the practicalities and necessities of the public interest. The decisions permitting delegation, reviewed in part in our earlier discussion, relate to a number and variety of concrete instances. Their meaningful message requires them to be taken broadly. The national Government has the power to do what is needful for the great national purposes that identify this country's adjustments to change and ultimately survival.²⁵ The legislature may delegate powers that cannot meaningfully be retained or constrained. Turning to present context, the Constitution did not forbid a Congress concerned with controlling inflation from coping with escalating expectations by calling on the shock of a general Presidential freeze to check the inflationary psychology.

6. Validity of delegation and of freeze not negated by failure to require declaration of emergency, or by lack of sudden or sharp price movement in 1971

Consideration of delegation of timing leads us into offshoot questions and corollary propositions.

a. The Union puts it that the delegation was excessively broad because there was no requirement that the President declare some kind of emergency before invoking these powers. The same point was made in debate by Congressmen opposed to the bill.²⁶ While the point is not without materiality it is not decisive. On the matter at issue, imposition of general controls, emergency is instinct in the situation. Congress may reasonably have feared that the Nation would have fared worse if the inflationary problem were dramatized by some further formal declaration of emergency, especially in view of the ambiguous situation where this kind of domestic emergency might coexist with a lessening of international stresses and strains. Since 1950 the Nation has been under a formal declaration of emergency which was initially accompanied by stabilization controls.²⁷ The conditions of crisis have witnessed many an ebb and flow since 1950, and significant changes in characteristics. But the courts cannot inject a constitutional requirement of a declaration calibrating the scale of emergency warranting particular actions. Congress may also have been fearful lest a refined declaration of emergency for one purpose have unintended and undesired carryover to quite different and unvisualized areas.

b. The Union goes on to say that there was no emergency in fact, that the President himself, in his message of August 15, points out that the rate of inflation had declined from 6% to 4% per annum. It may be that the President concluded that the kind of fiscal and monetary controls that had permitted a reduction in the rate of inflation entailed consequences that would become so grievous, if relied on exclusively in the future, as to jeopardize the public interest. It may be that he concluded that fiscal and monetary controls alone could not arrive at the kind of reduction in rate of inflation, to a level under 4% or even 3%, that was necessary to offset the inflationary psychology that plagued the Nation. These are not matters for us to determine. It suffices that there are such possibilities, and that this court cannot say that the President's message either negated any possible rational basis for his order, or offset the presumption of validity to which that order is entitled.

c. The need felt by Congress to delegate broadly to the President is not undercut by the circumstances that the country was not experiencing and Congress did not contemplate a sudden or dramatic price rise, such as sometimes accompanies a war or shooting emergency, but only a "creeping" inflation. Continuing the medical analogy a cost-push inflation is no less malignant than a demand-pull inflation. On the issue of delegation, Congress had reason to authorize the President to begin prompt treatment with direct controls whenever he concluded this was the proper course and regardless of the prior rate of spread of the disease. The matter was reconsidered in debate on the occasion of the 1971 extension, when some legislators argued that Congress should abandon a "Gulf of Tonkin" approach to the problem that delegated broadly to the President. Other legislators reasoned in response that the "creeping" nature of inflation required a broad delegation to the President to precipitate an effective counter-action.²⁸ We have no basis or warrant for holding that what purported to be a reasoned assignment of authority was only an abdication of responsibility.

7. *Significance of international factors*

This is a suitable juncture to refer to the undoubted and substantial significance of the interrelation between the domestic wage and price controls and the actions taken by the President on August 15, 1971, in the field of international trade and monetary adjustments. The President's message identifies the existence of such an interrelation though not its exact nature. The House Report's recount of legislative policy includes its recital that the current inflation malady is significantly responsible for the balance-of-payments crisis and liquidity squeeze. This was a 1970 problem and a legislative objective not known at the time of the 1942 and 1950 legislation. The consequence for international trade, liquidity and monetary relationships, enhances the range of power Congress may permissibly delegate to the President. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). And it particularly substantiates the legitimacy of delegating to the President the authority as to the timing for the blending of actions with international consequences.

8. *Limited duration of statute*

It is also material, though not dispositive, to note the limited time frame established by Congress for the stabilization authority delegated to the President.²⁹ The Act as enacted on August 15, 1970 expired February 28, 1971, estab-

See footnotes at end of article.

lishing a lifespan of about six months. Two subsequent extensions provided even shorter durations.³⁰ When the current expiration date of April 30, 1972, was set on May 18, 1971, Congress rejected the administration request for a two-year extension. Thus, in the words of the Government's memorandum, Congress established a "close control." It conjoined flexibility in the President to act promptly with an obligation in Congress to undertake an affirmative review without prolonged delay, without the option of acquiescence by inaction.

9. Statute not subject to attack as delegating authority to be unfair and inequitable law contains standard of broad fairness and avoidance of gross inequity

However Congress cannot delegate unlimited authority to the Executive over prices and wages even for a period limited to say, the 8-9 months between the President's Order of August 15, 1971, and the April 30, 1972 expiration date.

The Union says that during this period the President has been given a "blank check" for internal affairs which is intolerable in our constitutional system. The Union notes that the order exempted from controls the prices charged for raw agricultural products without statutory authority for the exemption. It claims that the failure of Congress to require, as in the 1942 and 1950 legislation that ongoing regulations be "fair and equitable" is tantamount to a delegation to the President of the power to be unfair and inequitable. The Union complains that there was a failure to provide a system for testing these orders, administratively and by judicial review, as in the earlier legislation.

The net result, charges the Union, is a legislative initiation of control by bare executive fiat, with completely unlimited authority put at the disposal of the President.

This is a formidable fusillade, devastating verbally and not without force analytically. When the smoke clears away, however, we conclude that the Rule of Law has been beleaguered but not breached.

We begin with the observation that we cannot stand on the analysis put to us by the Government. The Government does say, correctly, that the doors of the courts remain open. But the question is, whether the courts can appraise the claim that the stabilization actions do not conform to the legislative will, measured by an intelligible standard. If the courts are open only nominally, they would enhance rather than inhibit executive absolutism.

In the last analysis Government counsel seem to meet these contentions by relying on, and reiterating, the limited duration of the President's powers. That is material, as we have noted, but it is not itself a sufficient answer to the Union's contentions.

If the Act gives the President authority to be unfair and inequitable, as the Union claims, this legislative vessel may indeed founder on a constitutional rock.³¹ But we do not reach this constitutional issue because we do not think the Act can be given the extremist interpretation offered by the Union.

We take this view not only because of the doctrine that statutes are to be construed so as to avoid serious constitutional questions,³² but more directly because we do not think it can sensibly or fairly be said that this extremist approach was what was intended by the legislature. As we have already shown there is no lack of specificity in the constitutional sense in the standards of the Act for the initiation of controls, either in particular industries or sectors of the economy, or in the general wage price freeze.

The problem that now concerns us is whether the Act has sufficient specificity to avoid the constitutional condemnation, of excessive "blank check" authority to the President, as the period following the initial general price-wage freeze. The legislative history records the hope of the House Committee that an initial freeze for two or three months would suffice to give a handle to control inflation, and could be followed by a termination of controls.³³ But the law as extended in 1971 permitted controls for a period of some 11 months. While the Act contemplated the issuance of a general freeze it did not mandate that controls once begun as a general freeze must endure in the same vein. The House Report noted that they might be removed "in part." Members of the committee contemplated possible exceptions as well as "equity provisions."³⁴ This country's experience with its prior stabilization programs fairly establishes as the contemplation of Congress that controls under the Act need not be continued in a perpetuation of the general freeze beyond a temporary opening period. A freeze is always arbitrary to some extent, and while such arbitrariness can be sustained for a relatively short-range initial period its prolongation in a country as vast as ours, with problems so various, runs the risk of betraying the concept of responsible government.

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We do not think it can be said that the possibility of controls beyond the initial freeze was left without any standard other than the President's unfettered discretion, including the discretion to be unfair and inequitable. This is not a case where Congress indicated an intention to leave the matter wholly to the discretion of the President without any possibility of judicial review. The ultimate standard for follow-on controls replacing the freeze is a standard of fairness and equity. This standard of removal of "gross inequities" is voiced as an authority of the President in § 202 of the Act. See also House Report (p. 9). We think there is fairly implicit in the Act the duty to take whatever action is required in the interest of broad fairness and avoidance of gross inequity, although presumably his range of discretion means there may be inequities that a President may remove that he is not compelled by law to remove.

This conclusion is supported by constitutional considerations and historic context. The 1942 statute on prices specifically articulated the "generally fair and equitable" standard. But the broad equity standard is inherent in a stabilization program. It was incorporated into the 1942 wage control measures providing for stabilization of wages and salaries.³⁵ Fairness and equity are also furthered by the requirement (see point 10) that the Executive develop implementing standards, with deliberate criteria replacing the fortuities of a freeze.

To obviate any possible misunderstanding we refer to the general principle under which the requirement of fairness takes on content in the light of what is feasible. The law does not contemplate what is manifestly impracticable, or suppose that all problems are to be taken care of at once. And so it has been held that broad emergency price control measures need not entitle each particular seller to consideration of the equity of his position, for such an obligation would impose an administrative impracticability that would defeat the very purpose of the Act. *Bowles v. Willingham*, 321 U.S. 503 (1944).

In other contexts when agencies have been given enormous regulatory tasks, the courts have interpreted the underlying statutes to take account of what is feasible. Perhaps the outstanding opinion along these lines is *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), where the Court upheld agency action exercising an authority to provide a moratorium on requests for relief (pp. 777-81), granting exemptions not specifically voiced in the statute (pp. 785-87), deferring certain issues and guidelines for later consideration (pp. 788), focusing first on aggregate problems and moving on in the light of experience to more refined consideration of problems of need or equity (pp. 772, 822). Similarly in *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 313-14 (1963), the Court took pains to point out that ordinarily, at least, a court cannot say that an agency makes an error of law "in deciding how best to allocate its resources" and that the courts will not deprive the agencies of "the flexibility [they] must have at this still formative period in a difficult area of . . . regulation."

It is not our purpose or function at this time to define the contours of the standard of broad fairness and avoidance of gross inequity. That would be appropriate if the taking or omission of specific action were challenged. But we reiterate that we cannot accept the contention of the Government that the court must pass on the constitutionality of the Act without any conception of its content. We take the intermediate course and rule that our judgment has two parts: first, that the statute does at least contain a standard of broad fairness and avoiding gross inequity,—leaving to the future the implementation of that standard; second, that this statute is not unconstitutional as an excessive delegation of power by the legislature to the executive for the limited term of months contemplated by Congress to follow the initiating general freeze.

10. *Need for ongoing administrative standards as avoiding undue breadth of executive authority*

Another feature that blunts the "blank check" rhetoric is the requirement that any action taken by the Executive under the law, subsequent to the freeze, must be in accordance with further standards as developed by the Executive. This requirement, inherent in the Rule of Law and implicit in the Act, means that however broad the discretion of the Executive at the outset, the standards once developed limit the latitude of subsequent executive action.

The importance in present context of this self-limiting aspect of executive and agency discretion is brought out in *Yakus v. United States*, *supra*. After noting that the Constitution does not demand the impossible, that the essentials of the legislative function are preserved with a determination of legislative policy, Chief Justice Stone continues:

See footnotes at end of article.

It is no objection that the determination of facts and inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework.³⁶

The crucial paragraph of the opinion specifically relies on the reasoning of Executive administration as helping to supply the requisite specificity and precision:

[T]he standards prescribed by the present Act, with the aid of the "statement of consideration" required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the Courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. [Citation] Hence we are unable to find in them an unauthorized delegation of legislative power.³⁷

The requirement of subsidiary administrative policy, enabling Congress, the courts and the public to assess the Executive's adherence to the ultimate legislative standard, is in furtherance of the purpose of the constitutional objective of accountability. This 1970 Act gives broadest latitude to the Executive. Certainly there is no requirement of formal findings. But there is an on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective. This requirement is underscored by the consideration that the exercise of wide discretion will probably call for "imaginative interpretation," leaving the courts to see whether the executive, using its experience, "has fairly exercised its discretion within the vaguish, penumbral bounds" of the broad statutory standard. *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 90-91 (1953).

In view of the administration of the prior two stabilization programs³⁸ the Government cannot sensibly contend that the requirement of development of administrative standards is unattainable or would reduce to a futility the legislative objective of controlling inflation.

11. Applicability of Administrative Procedure Act provisions on administrative rule-making and judicial review

The claim of undue delegation of legislative power broadly raises the challenge of undue power in the Executive and thus naturally involves consideration of the interrelated questions of the availability of appropriate restraints through provisions for administrative procedure and judicial review. These components of fairness are themselves elements of statutory and constitutional rights but it is appropriate to discuss them in present context because they bear on the issue whether there has been undue delegation to the Executive.

The safeguarding of meaningful judicial review is one of the primary functions of the doctrine prohibiting undue delegation of legislative powers. That this element of the doctrine, which was noted in *Yakus*, has current vitality is brought out by the observation of Justice Harlan in *Arizona v. California*, 373 U.S. 546, 626 (1963):

[The doctrine] prevents judicial review from becoming merely an exercise at large by providing the Courts with some measure against which to judge the official action that has been challenged.

The Government concedes and we agree that the Executive's actions under the 1970 Act are not immune from judicial review. There are occasions when Congress has so committed matters to executive discretion as to avoid judicial review or to remove judicial review for error of law, including abuse of discretion, restricting it to the narrow function of correcting flagrant disregard of a clear-cut legislative mandate. These occasions are, however, the rare exception³⁹ arising only in such fields as foreign affairs and national defense,⁴⁰ or where Congress has expressly or impliedly directed that the Executive proceed without statement of reasons because the functioning must rest on confidence or be conducted with extraordinary expedition,⁴¹ or where the legislature manifests an intent to avoid review in order to further its objective, as where a failure to exercise discretion to exempt is made non-reviewable in furtherance of the objective of narrow exemptions.⁴²

See footnotes at end of article.

The Government's position rests on the proposition that since the Act provides for enforcement either by way of fine (§ 204), or by way of injunction restraining violations (§ 205), and the person charged with violation is able to obtain judicial review by inserting a defense to either type of enforcement proceeding, this provides ample judicial review for constitutional purposes.

We need not consider whether under conditions of modern life the Constitution permits a restriction to enforcement proceedings of judicial review of Executive discretion as broad in range and significant in impact as that provided by this law, requiring citizens with substantial doubts concerning the validity of the exercise of such broad discretion to run the risk of criminal proceedings. Compare *Ex parte Young*, 209 U.S. 123 (1908).

It is our conclusion that in addition to the judicial reviews noted by the Government, challenges may be made under the provisions for judicial review in the Administrative Procedure Act, 5 U.S.C. §§ 701-706. These provisions contemplate an action for declaratory judgment or injunction, assuming pertinent requirements for these forms of action are met, as well as a defense in civil or criminal proceedings, see 5 U.S.C. § 703. They provide that a person suffering legal wrong because of agency action is entitled to review thereof, 5 U.S.C. § 702. Judicial review is provided for final agency action for which there is no other adequate remedy in court, 5 U.S.C. § 704.

When the impact of regulations is direct and immediate, so that the controversy is "ripe" for judicial resolution, these provisions of 5 U.S.C. §§ 701-706, permit pre-enforcement judicial review. There is a basic presumption of judicial review. The courts restrict access to judicial review only upon a showing of clear and convincing evidence of a contrary legislative intent. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967).

Pre-enforcement judicial review may be withheld when regulations do not have an immediate impact on the complainant and only minimal adverse consequences will be involved if the regulation is challenged in an enforcement proceeding. *Toilet Goods Assn v. Gardner*, 387 U.S. 158, 164-66 (1967).

We have no occasion to expatiate on these familiar provisions and principles for judicial review of agency actions, or to determine what kinds of agency action under the 1970 Act may be classified as "final" and reviewable, or when some court remedy other than direct review may be "adequate." We merely note that we see no indication whatever, let alone the "clear and convincing evidence" required by the Supreme Court decisions, that the actions taken under the 1970 Act are removed from the judicial review provisions of 5 U.S.C. §§ 701-706.

The term "agency" is defined broadly. See 5 U.S.C. § 701(b) (1) :

§ 701. Application; definitions

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

* * * * *

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

The leading students of the APA, whose analyses are often cited by the Supreme Court, and who on some matters are in conflict with each other, seem to be in agreement that the term "agency" in the APA includes the President⁴³—a conclusion fortified by the care taken to make express exclusion of "Congress" and "the courts."

But we need not consider whether an action for judicial review can be brought against the President *eo nomino*. Certainly such actions can be brought against the official who exercises functions vested by Congress in the President and delegated by the President to him.⁴⁴ The Cost of Living Council is an "authority" of the United States and Executive Order 11615 was only recording the incontrovertible when it specified that the Council "shall act as an agency of the United States."

None of the other exceptions listed in 5 U.S.C. § 701(b) (1) are applicable. Indeed it is significant that Congress failed to bring the Act within the exception

See footnotes at end of article.

of (II). For (II) does exclude from the definition of "agency" functions performed under the Defense Production Act. It is noteworthy that Public Law 91-379 has two Titles. Title I is captioned "Defense Production Act Amendments" and its four sections constitute amendments of the Defense Production Act. However Title II of Public Law 91-379, captioned "Cost of Living Stabilization," is in no way made part of or referable to the Defense Production Act. Indeed, it has even been codified as a part of Title 12 of the U.S. Code, Banks and Banking, appearing in a footnote to 12 U.S.C. § 1904. The applicability of the Administrative Procedure Act cannot be doubted.

By the same token actions under this 1970 Act are subject to the administrative procedure provisions of the Administrative Procedure Act, 5 U.S.C. § 551ff. It may well be that the applicability of these provisions will have no practical consequence. The rule-making provisions of 5 U.S.C. § 553, requiring notice and opportunity for participation by interested persons, are subject to the provision in subsection (b) removing those requirements "(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The adjudication provisions of 5 U.S.C. § 554 are applicable only when an agency hearing is required by the statute, or by compulsion of general law, *cf.* *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). And *Yakus* upheld the validity of the failure to provide for such hearings in the 1942 maximum price law.

After the foregoing was written the court received the Congressional Record for October 19, 1971, which contains (at p. S 16414) the Administration's legislative proposal for Phase II of the stabilization program. The assumption that the courts would or at least might reach the conclusion set forth in the preceding paragraph presumably accounts for the inclusion in that proposal of a section 207, "Administrative review," that would provide an exemption from the APA. In the context of the applicability of the general provisions of the Administrative Procedure Act, as amended both as to the administrative procedure and judicial review, it is hollow to say that the 1970 Act was void *ab initio* for failure to make provision for these matters. We have no basis or warrant for considering—or rather speculating—in this action whether the on-going administration of the stabilization program may become subject to challenge for failure to provide reasonable and meaningful opportunity for interested persons to present objections or inequities that undercut the premise of broad equity, or for officials to take these into account, or for courts to discharge their function of judicial review.

12. Discussion of *Schechter* and other plaintiff precedents

We end this section of the opinion with broad closing references to precedent. First a last word as to *Yakus*. We do not understand *Yakus* to rest in a crucial sense on the exercise of the war power. No claim is made to us that this 1970 law lies outside the substantive powers of Congress, but only that its powers should have been exercised with different techniques. Nor does *Yakus* depend on the existence of the state of war as a condition. As pointed out by Justice Rutledge, in a dissenting opinion that concurred with the majority on this issue, 321 U.S. at 462-63, the legislation "as the Court's opinion demonstrates, does not go beyond the limits allowed by peacetime precedents in the substantive delegation."

We turn finally to precedents cited by the Union. They remind us that Separation of Powers is a doctrine with vitality. It is the force that motivated *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)—where however the executive order seizing the nation's steel mills was without any authorization in legislation. Given a legislative enactment, there have not been any Supreme Court rulings holding statutes unconstitutional for excessive delegation of legislative power since the *Panama Refining* and *Schechter* cases invalidated provisions of the National Industrial Recovery Act of 1933.

These cases express a principle that has validity—reserved for the extremist instance. These precedents were referred to in *Fahey v. Mallonee*, 332 U.S. 245, 249 (1947):

Both cited cases dealt with delegation of a power to make federal crimes of acts that had never been such before and to devise novel rules of law in a field which there had been no settled law or custom.

See footnotes at end of article.

They are without vigor for a case like the one before us, where the delegation is in a context of historical experience with anti-inflation legislation.

The particular application of the delegation principle in *Panama Refining* was colored, as students of the Court's decisions have noted, by the circumstance that the regulation in that case was not generally available and had been inadvertently amended out of effect—a circumstance that led to the creation of the Federal Register.

In *Schechter*, which held invalid the provisions of the National Industrial Recovery Act that authorized the fixing of codes of fair conduct, the "function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated." *Yakus v. United States*, *supra*, 321 U.S. at 424; *Fahey v. Mallonee*, *supra*, at 249. The "corporate state" aspects of the Blue Eagle codes that emerged in practice were made possible and reenforced by a legal context of authority to prescribe "codes of fair competition" that covered the entire range of economic life, going beyond even the broad subject matter before us.

A supplemental memorandum in another lawsuit has raised the question that the President's plans for a Price Commission and a Pay Board do present the very kind of delegation of government power to private groups that was involved in *Schechter*. That claim has not been put forward by the plaintiff in this case, possibly because the Union has different litigating interest. We note the point only to say that we do not and are not required to pass on it. We have no way of knowing whether or to what extent the President will delegate authority to persons who are not, at least pro tanto, part of a government agency, or will provide for review of their exercise of such authority. More important, any such delegation is not inherent in the Act as passed. The presumption must be that Congress, in vesting power in the President, contemplated only such further delegation as would be consistent with law, including the requirement that the orders providing for stabilization be issued on a basis that accords with general fairness and avoids gross inequity, and provide for administration and procedures that are meaningfully consistent with that standard. If there should be a problem with the administration provided by the President, whether as to structure or procedure, it may be subject to attack as not consistent with the Act, but it does not render the Act void *ab initio*, which is the Union's core claim.

Schechter has fairly been described as a ruling that administered "the hemlock of excessive delegation" in a case of "delegation run riot."⁴⁵ We think the extremist pattern then before the Court cannot fairly be analogized to the anti-inflation statute, limited in life and passed in a context of experiences with similar legislation, that is before us for consideration.

C. OTHER LEGAL CHALLENGES

The Union's other challenges are all on matters that doubtless concern the Union deeply but do not present significantly troublesome legal questions.

1. Applicability to existing contracts

The Union complains that its contracts have been impaired without constitutional authority or validating executive findings. But it is plain beyond doubt that contracts do not fetter the constitutional authority of Congress. *Norman v. B. & O. R.*, 294 U.S. 240, 307–10 (1935); *Louisville & N. R. v. Mottley*, 219 U.S. 467, 482 (1911) "Immunity from federal regulation is not gained" either through "forehand contracts," see *Flemming v. Rhodes*, 331 U.S. 100, 107 (1947), or through contracts that, however commendable when signed, would frustrate government programs if carried into effect.

There is little point in marshalling the cases on the impairment of contracts clause of the Constitution since this is applicable, on its face, only to the states. As to the Federal Government our concern is with the due process clause.

Whatever may be said as to the need for reasoning to override contracts in some other context, it was not required for the general freeze so plainly within Congressional contemplation. The Executive Order operates in futuro, to wage increases becoming effective subsequent to its issuance.

While questions may arise as to the significance to be given prior contracts in any ongoing administration of the Act, those relate at least in the first instance to considerations of subsidiary administrative policy for implementation of the statute.

See footnotes at end of article.

2. Applicability to fringe benefits

The other principal question put to us is that the authority under the 1970 law to stabilize "wages, salaries" does not include the authority to control fringe benefits.

The Union attaches decisive significance to the absence in the Act, of the words "and other compensation," a phrase that appeared in the Defense Production Act of 1950, and which in the Union's view "clearly evinced Congressional intent to cover all forms of remuneration." The decisive significance attached by the Union to the wording in the 1950 law "any wage, salary, or other compensation" is contrary to the analysis in *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 546 (1954) where the Court took note that the 1950 wording differed from "wages or salaries" phrase in the 1942 law, and observed: "[T]he substance of the two sections is inescapably the same."

The contemporaneous interpretation of the 1970 law by the Executive is to be accepted unless palpably unreasonable or contrary to discernible legislative intention. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). The legislature was concerned with the 1970 condition of "cost-push" inflation, as contrasted with the "demand-pull" inflationary conditions of 1942 and 1950. This supports control in 1970 of items like fringe benefits which inevitably enter into the cost structure and thus intensify cost-push inflation, even though the lack of added money in the pockets of the worker would lessen the impetus to "demand-pull" inflation.

* * * * *

A motion for a preliminary injunction normally entails consideration of the "probability" of success on the merits. The nature of the presentation made to this court, and the clear implication that none of the parties contemplated a further stage of this litigation for the purpose of presenting evidence, have led this court to consider the issues on the assumption that what all concerned have in mind is a determinative ruling on the legal issues. Our view of the applicable law makes it clear that plaintiff's motion for injunctive relief must be denied.

So ordered.

HAROLD LEVENTHAL,
United States Circuit Judge.
AUBREY E. ROBINSON, Jr.,
United States District Judge.
CHARLES R. RICHEY,
United States District Judge.

October 22, 1971.

FOOTNOTES

¹ Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

² P.L. 91-379, 84 Stat. 799; as amended, P.L. 91-558, 84 Stat. 1468; P.L. 92-8, 85 Stat. 13; P.L. 92-15, 85 Stat. 38. The Act is set forth at 12 U.S.C. § 1904, note.

³ Swift & Co., Armour & Co., Hygrade Food Products Corp., Wilson Certified Foods, Wilson-Sinclair Corp., Wilson Beef & Lamb Co., John Morrell & Co., and Cudahy Packing Co.

⁴ Chairman: Secretary of the Treasury, Vice Chairman: Chairman of the Council of Economic Advisers. Other members: Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Director of the Office of Management and Budget, Director of the Office of Emergency Preparedness, Special Assistant to the President for Consumer Affairs. All these officials were named as defendants in this action, individually and as members of the Council, and will be referred to as the "Federal defendants."

The Order also provides: "The Chairman of the Board of Governors of the Federal Reserve System shall serve as adviser to the Council." The Federal Reserve Chairman, Dr. Arthur Burns, was not named as a defendant.

⁵ K. Davis, *Administrative Law* 731 (1951).

⁶ *Green v. Connally*, C.A. 1355-69, U.S. Dist. Ct. for Dist. of Col. (3-judge court), June 30, 1971, 28 AFTR 2d 71-5164.

⁷ *United States v. Grimaud*, 220 U.S. 506, 517 (1911). The Court upheld a law that authorized the Secretary of the Interior to make rules "to insure the objects" of the national forests, and made violation of such regulation punishable as a crime. It reversed its initial 4-4 judgment affirming a decision, *United States v. Grimaud*, 170 Fed. 205 (S.D. Cal. 1909), which held the law invalid.

⁸ *Currin v. Wallace*, 306 U.S. 1, 15 (1939). See also *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904): "Congress legislated on the subject as far as was reasonably practicable" *Lichter v. United States*, 334 U.S. 742, 785 (1948):

It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program.

⁹ These questions appear in *Yakus v. United States*, *supra*, 321 U.S. at 424 and 425.

¹⁰ *Hampton v. United States*, 276 U.S. 394, 409 (1928). The core quality of the "intelligible principle" analysis is developed in L. Jaffe, *An Essay on Delegation of Legislative Power*, 47 Col. L. Rev. 359, 561, at 569 (1947).

¹¹ See the excerpt quoted below at text to footnote 37, from *Yakus v. United States*, 321 U.S. at 426.

¹² *Yakus v. United States*, 321 U.S. at 426.

¹³ Sen. Rep. No. 92-89, 92nd Cong. 1st Sess., p. 3.

¹⁴ That Act as passed January 30, 1942, 56 Stat. 23, permitted the administrator to set maximum prices in a particular industry where prices, in his judgment, "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act." The administrator issued maximum price regulations for particular industries until the General Maximum Price Regulation, issued April 30, 1942, 7 F.R. 3153, forbade the sale of most commodities at prices in excess of the highest price charged by the seller during March 1942.

¹⁵ Intermountain Rate cases, 234 U.S. 476, 487-88 (1914).

¹⁶ *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946); *Fahey v. Mallonee*, 332 U.S. 245, 250-252 (1947); *Lichter v. United States*, 334 U.S. 742, 785 (1948).

¹⁷ Federal Defendants' Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction, Sept. 21, 1971, p. 20.

¹⁸ See *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954), involving the wage stabilization program under the 1950 Act. The Court held the 1950 act is to be read with reference to the Stabilization Act of 1942, as "the context in which Congress enacted it." 347 U.S. at 541.

The Defense Production Act of 1950, Sept. 8, 1950, c. 932, 64 Stat. 798, contained Title IV—Price and Wage Stabilization. Section 402(b) specified as a prerequisite to imposition of ceilings on an individual material or service, but provided that when ceilings have been established on "a substantial part of all sales at retail and materially affecting the cost of living, the President (1) shall impose ceilings on prices and services generally, and (ii) shall stabilize wages, salaries, and other compensation generally."

¹⁹ This report accompanied H.R. 17880, which was passed by the House. Then the provision in Title II, Cost-of-Living Stabilization, were added by the House to S. 3302, and were accepted by the Conference Committee, the House and the Senate.

²⁰ *United States v. International Union, UAW-CIO*, 352 U.S. 567, 585 (1957); *Cole v. Young*, 351 U.S. 536, 548 (1956); *Pan American World Airways v. CAB*, 380 F. 2d 770, 779 (2d Cir. 1967); *Pridemark, Inc. v. Commissioner*, 345 F. 2d 35, 41 (4th Cir. 1965).

²¹ P.L. 91-151, 12 U.S.C. § 1904.

²² See Mr. Widnall, 116 Cong. Rec. H7507, July 31, 1970, opposing the bill, quoting from President Nixon's speech to the Nation on June 17, 1970, on the economy "I will not take this Nation down the road of wage and price controls."

²³ Speaker Albert's statement is at 116 Cong. Rec. p. H7508, July 31, 1970:

Last year, for the first time in a decade, the gross national product failed to grow. Industry is operating substantially below capacity. Consumer confidence has experienced a sharp deterioration. Mr. Chairman, this Nation is now in the grips of a serious recession.

Mr. Chairman, the guilty culprit is undoubtedly the traditional monetary and fiscal policies being employed by this administration in its futile and misguided efforts to combat inflation. The ill-advised medicine of a choking tight money policy has produced record high interest rates. The administration's fiscal objectives have been characterized by all the social breadth of a bookkeeper and the human compassion of an Ebenezer Scrooge. All efforts by this Congress to increase public investment in housing, health, education, and antipollution, are denounced from the White House and stoutly resisted by its spokesmen in the Congress as fiscal irresponsibility. Vetoes and threats of vetoes of our efforts to improve the quality of life in this Nation are the order of the day.

Mr. Chairman, it is abundantly clear that President Nixon and his economic advisers are prescribing the wrong medicine for the particular inflationary virus now affecting the Nation. Classical restrictive fiscal and monetary policies certainly have a proper role to play in combating traditional "demand-pull" inflation. Such demand-pull inflation is invariably the result of shortages in manpower and productive capacity. We possess neither today. Unemployment has risen during the past year and it is conceded by the administration spokesmen that it will increase further during 1970. We likewise possess an abundance of unused industrial capacity.

²⁴ While the point is explicitly made in the context that Congress might not be in session when controls should be terminated (House Report p. 11), there is obvious application to justify a delegation of timing of institution of controls.

²⁵ Cf. 116 Cong. Rec. H7504, July 31, 1970, Mr. Patman, in charge of the bill: "As the Chairman of the Committee on Rules said, our country can be destroyed by inflation."

²⁶ E.g., Mr. Gross, 116 Cong. Rec. H7504, July 31, 1970:

"I have read through title II backward and forward and I can find no place, no point in title II of this bill where there is even the requirement on the President that he declare any kind of emergency, either war emergency or domestic emergency, as a preliminary to the invocation of these powers that here would be granted to him."

²⁷ Proclamation No. 2914, 15 F.R. 9029 (Dec. 19, 1950).

²⁸ Senator Packwood proposed an amendment whereby the authority of the President to impose general controls be dependent on a concurrent resolution of Congress that this was required by the public interest. 117 Cong. Rec. p. S6135, May 3, 1971. He argued in debate, *inter alia* (p. S6136): "Inflation is not an emergency, if by an emergency we mean some unexpected happening occurring immediately." Senator Proxmire responded (p. S6136):

Although I oppose the amendment, I think there is much to be said for a reluctance to give the President the kind of authority which would give him power to impose wage and price controls.

I recall that when Mr. Burns appeared before the Joint Economic Committee, he said he would give the President this authority for 2 weeks. The administration is asking for the authority for 2 years, and I have been so concerned about it that that is one of the reasons why I have limited the present authority to 6 months.

If we provide that before wage and price controls can be imposed, it is necessary to introduce a resolution to do so to have it referred to committee, to have hearings on it, to discuss it in the hearings, then to bring it out on the floor and debate on the floor that kind of resolution, we can imagine the effect that this could have on the country.

"They [the ordinances regulating laundries] seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way

a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of *mandamus* to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to them mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint. * * *

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. . . . [T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

³² For the general doctrine see e.g., *United States v. Rumely*, 345 U.S. 41, 45 and cases cited (1953).

There is abundant precedent for application of this doctrine to avoid a conclusion that a statute vests unfettered discretion in the Executive.

In the Japanese Immigrant Case, 189 U.S. 86, (1903) Justice Harland said (p. 101) :

The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant.

In *Kent v. Dulles*, 357 U.S. 116 (1958), the Court said at 128-130 :

"We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose. * * * We would be faced with important constitutional questions were we to hold that Congress . . . had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement."

Only last year the Court said in *Gutknecht v. United States*, 396 U.S. 295, 306-7 (1970) :

The power under the [Selective Service] regulations to declare a registrant "delinquent" has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not congenial to our law-making traditions. * * * We search the Act in vain for any clues that Congress desired to Act to have punitive sanctions apart from the criminal prosecutions specifically authorized. Nor do we read it as granting personal privileges that may be forfeited for transgressions that affront the local board. If federal or state laws are violated by registrants, they can be prosecuted. If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed. Standards would be needed by which the legality of a declaration of "delinquency" could be judged.

³³ See e.g., House Report at p. 9 "It is envisaged that the freeze, to be effective in getting a handle on inflation, would need to be enforced for only 2 or 3 months." See also p. 11 "[O]ne could easily envision the possibility that, once having imposed wage-price-salary-rent freezes, a few months hence it would be necessary to remove them in whole or in part." See also Congressman Reuss, 116 Cong. Rec. H7512 July 31, 1970, referring to the 2-3 month freeze as the time within which the administration could "work out with labor and management a noninflationary incomes policy to hold the line over the next difficult year or two."

³⁴ Mr. Reuss, 116 Cong. Rec. H 7512 (July 31, 1970).

³⁵ On April 27, 1942, President Roosevelt asked Congress and the Nation to carry out a 7-point stabilization program as "our present national economic policy." See H. Doc. 716, 77th Congress 2d Sess. 88 Cong. Rec. 3689. Point 3 stated: "To stabilize the remuneration received by individuals for their work." He stated that legislation was not required under then prevailing circumstances, noting that labor had voluntarily given up the right to strike during the war and that existing contracts would be carried out to expiration date. In amplification of point 3, the President stated:

I believe that stabilizing the cost of living will mean that wages in general can and should be kept at existing scales. * * * [A]ll stabilization or adjustment of wages will be settled by the War Labor Board machinery which has been generally accepted by industry and labor for the settlement of all disputes. * * * The existing machinery for labor disputes will, of course, continue to give due consideration to inequalities and the elimination of substandards of living.

On July 16, 1942 the National War Labor Board issued its decision in the *Little Steel Case*. In *Re Bethlehem Steel Corp. et al.* No. 2748-D et al (1 WLR 325). The Board applied the yardstick of a "stabilization factor" limiting the available wage increases to 15% above the January 1, 1941, level, the increase in the cost of living index between that date and the President's 7-point program. The Union had requested a \$1 per day increase above the wages set in April 1941 to compensate for the 13% rise in the cost of living index since April 1941. The yardstick of January 1, 1941 meant that in view of the increase established in April 1941 (of about 11%) there could only be an additional 2.8% increase not the 13% sought by the Union.

The Board granted an additional slight adjustment because of the "peculiar . . . time equities of the steelworkers the majority opinion, written by Dr. George W. Taylor, Vice Chairman, saying: "A mechanical and a rigid application of the stabilization program to this long-pending case" would lead to "a deep sense of injustice" in the steelworkers, arising out of the change in rules, and would indicate an arbitrariness that would "offend the American people's sense of fair play."

Chairman Davis summarized the majority opinion as applying yardsticks to wage stabilization that were "*fair and equitable* and at the same time sufficient to prevent the cost of living from spiraling upward because of wage adjustments. We think they lead to a 'terminal' for the tragic race between wages and prices." (Emphasis added.) The Little Steel "formula" was later adopted by the Board when Congress passed the Stabilization Act of October 2, 1942. A succinct account of the foregoing appears in H. Stein, *Public Administration and Policy Development* 784 ff. (1952).

The Stabilization Act of October 2, 1942, directed the President "to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living" with authority to make adjustments "to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities." 56 Stat. 765.

That the broad and well known programs for administration of stabilization measures may be taken, especially in view of the annual extensions (see note 29), as interpretations congruent with Congressional contemplation, *see* *Allen v. Grand Cent. Aircraft Co.*, *supra*, 347 U.S. at 544-545.

³⁶ 321 U.S. at 425.

³⁷ 321 U.S. at 426.

³⁸ See text to fn. 17, above.

³⁹ See *Overton Park v. Volpe*, 401 U.S. 402 (1971).

⁴⁰ *Curran v. Laird*, 136 U.S. App. D.C. 280, 420 F. 2d 122 (en banc, 1969).

⁴¹ *City of Lafayette v. SEC*, — U.S. App. D.C. —, — F. 2d — (Oct. 12, 1971); *Int'l Ass'n of Mach. & A. Wkrs. v. Nat'l Med. Bd.*, 138 U.S. App. D.C. 96, 425 F. 2d 527 (1970).

⁴² *The Wheelabrator Corp. v. Chafee*, — U.S. App. D.C. —, — F. 2d — (Oct. 14, 1971).

⁴³ R. Berger, *Administrative Arbitrariness—A Synthesis*, 78 Yale L.J. 965, 997 (1969); K. Davis, *Administrative Arbitrariness—A Postscript*, 114 U. of Pa. L. Rev. 823, 832 (1966); L. Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401, 769, 778, 781 (1958).

⁴⁴ *E.g.*, *Gulf Oil Corp. v. Hickel*, 303 F. Supp. 31, 32 (D.D.C. 1969), *affirmed* — U.S. App. D.C. —, 435 F. 2d 440 (1970).

⁴⁵ T. R. Powell, *Vagaries and Varieties in Constitutional Interpretation* (Col. U. Press) p. 79.

ANNEX "A"

Act of August 15, 1970, P.L. 91-379, 84 Stat. 799 (as amended by P.L. 91-558, 84 Stat. 1468; P.L. 92-8, 85 Stat. 13; P.L. 92-15, 85 Stat. 38).

To amend the Defense Production Act of 1950 and for other purposes.

* * * * *

TITLE II—COST OF LIVING STABILIZATION

§ 201. *Short title*

This title may be cited as the "Economic Stabilization Act of 1970."

§ 202. *Presidential authority*

(a) The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities.

(b) The authority conferred on the President by this section shall not be exercised with respect to a particular industry or segment of the economy unless the President determines, after taking into account the seasonal nature of employment, the rate of employment or under-employment, and other mitigating factors, that prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally.

§ 203. *Delegation*

The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he may deem appropriate.

§ 204. *Penalty*

Whoever willfully violates any order or regulation under this title shall be fined not more than \$5,000.

§ 205. *Injunctions*

Whenever it appears to any agency of the United States, authorized by the President to exercise the authority contained in this section to enforce orders and regulations issued under this title, that any person has engaged, is engaged or is about to engage in any acts or practices constituting a violation of any

regulation or order under this title, it may in its discretion to bring an action, in the proper district court of the United States or the proper United States court of any territory or other place subject to the jurisdiction of the United States to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. Upon application of the agency, any such court may also issue mandatory injunctions commanding any person to comply with any regulation or order under this title.

§ 206. *Expiration*

The authority to issue and enforce orders and regulations, under this title expires at midnight April 30, 1972, but such expiration shall not affect any proceeding under section 204 for a violation of any such order or regulation, or for the punishment for contempt committed in the violation of any injunction under section 205, committed prior to May 1, 1972.

ANNEX "B"

EXECUTIVE ORDER No. 11615

[Omitted, see p. 230.]

ANNEX "C"

91ST CONGRESS	}	HOUSE OF REPRESENTATIVES	{	REPORT
<i>2d Session</i>				No. 91-1330

DEFENSE PRODUCTION ACT EXTENSION AND ECONOMIC STABILIZATION ACT

JULY 27, 1970.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. PATMAN, from the Committee on Banking and Currency,
submitted the following

REPORT

together with

MINORITY VIEWS AND ADDITIONAL VIEWS

[To accompany H.R. 17880]

* * * * *

TITLE II—COST-OF-LIVING STABILIZATION

This title of H.R. 17880 would provide *discretionary* authority to the President to issue orders and regulations to stabilize prices, rents, wages, and salaries at levels of not less than those prevailing on May 25, 1970.

This discretionary authority would expire on February 28, 1971. It is envisaged that the freeze, to be effective in getting a handle on inflation, would need to be enforced for only 2 or 3 months. Title II of H.R. 17880 reflects a sincere congressional willingness to do its part—and to share the consequences—in a meaningful attack on inflation.

Under this legislation the President would have the authority to determine whether or not such orders and regulations should be issued. Further, the President would have the authority to make any adjustments within such orders and regulations as deemed necessary to prevent any inequities that might occur as the result of such stabilization orders.

This title should be thought of in conjunction with the authority given by the Congress to the President in Public Law 91-151, enacted in December 1969, whereby the President was given authority to impose selective controls over any or all forms of credit when he determines that such action would be necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of excessive credit.

The combination of these two provisions—discretionary control authority granted the President last year and the proposed authority provided in this legislation—will, in the opinion of your committee, provide the President with all of the tools necessary to control inflation, while at the same time providing for healthy economic growth. In this way we will not need to rely exclusively on fiscal and monetary actions which place an inordinate burden on those segments of our economy and society least able to bear them.

Many economists, many Members of Congress, some of whom have introduced legislation similar to title II of H.R. 17880, labor leaders, the AFL-CIO, mayors of some of our Nation's largest cities, and others have called on the Congress to provide discretionary standby authority to the President to impose wage, price, rent, and salary controls to combat and break the back of inflation and the inflation psychology which pervades our thinking and our economy.

A Gallup poll conducted in the middle of June clearly indicates the wishes of the American people in this matter. This poll concluded that if the question on wage and price controls "were put to the people of the Nation in the form of a referendum, * * * they would * * * vote in favor of mandatory controls."

Many Members of Congress have received letters and an overwhelming response to questionnaires which they have sent their constituents favoring the institution of wage and price controls on an equitable basis at this time. A distinguished member of our own committee from the minority party, Hon. Albert W. Johnson, Republican, of Pennsylvania, perhaps has clearly reflected the views received by many Members of Congress when he said during the committee hearings on this legislation, "* * * I just finished tabulating a questionnaire from the people in my district and 69 percent said they favor compulsory wage and price controls at this time in order to control inflation."

It is the firm opinion of the majority of the members of your committee that if the Congress, in its wisdom, enacts this legislation, the President will have all of the necessary weapons needed to control inflation.

No one can doubt that inflation is still on a rampage in our economy. The cost-of-living figures released on July 22 indicated that prices have risen in the first half of this year at a 6 percent annual rate. Granted that this rate of increase is insignificantly less than that experienced in the first half of last year, this in no way provides any solace to the unemployed, the aged, and others living on fixed incomes, and the wage earner who finds his wages continually eroded by increases in the cost of living. This same inflation is responsible for the housing depression, the balance-of-payments crisis, and the current liquidity squeeze.

The majority of your committee finds that the "economic game plan" imposed by the administration has created fantastically high levels of unemployment and, at the same time, done nothing to effectively reduce living costs. Many economists, including at least one academic economist who is a close adviser to the President, has indicated that the unemployment rate at the end of this year would probably approach or exceed 6 percent. Already unemployment in various industries is running at alarming levels. For example, the unemployment rate for construction workers in a most recent month was at 9.1 percent; for unskilled, 8.1 percent; for Negroes, 8 percent; and for the semiskilled, 6.7 percent.

Coupled with the continual price rise, the average workweek for factory workers is down substantially—to the lowest level since the recession year of 1961. As a result, last year the average weekly earnings of workers in the United States has increased less than the rise in living costs and brought the buying power of the worker's weekly pay check down to a level below that which it was 5 years ago!

The unfortunate "economic game plan" of the administration has also created a situation whereby the homebuilding industry and home mortgage market is in a depression. The commitment which Congress gave to the American people in the Housing Act of 1968—to provide 26 million additional units of housing in the next decade—obviously cannot be met at current levels of construction.

Currently, new units are being provided, at best, at only half the annual rate needed to meet this goal. Home mortgage interest rates are at all-time highs and not only our low- and moderate-income people, but also middle-income people cannot afford to acquire a home. But yet the cost of living—inflation—continues rampantly on.

Our Nation cannot suffer through another recession without doing extreme damage to the goals which we have set for ourselves over the coming years. We cannot allow productivity to be stifled by willfully promulgating economic policies at the national level to increase unemployment, reduce productivity, and curtail the full use of all of our productive capacities.

Historic fact and economic analysis clearly indicate that once price and wages are brought under control, interest rates can be drastically reduced. Currently, the high level of interest rates include a large percentage for expected inflation. There is no question that interest rates themselves are inflationary in nature. When one looks at the level of interest rates now being demanded and obtained in the market of 10 percent or more, perhaps 6 percent of that can be accounted for by expected increases in prices during the coming year.

Those members of your committee who argued against this title during committee hearings and voted against this title during the executive sessions, argued that legislation providing for wage and price freezes should be mandated by the Congress if the Congress desires this authority, and not left up to the discretion of the President. The majority of your committee argued that this is an obvious ploy to detract attention from the fact that this responsibility must reside with the President and within the executive branch. The Congress itself is neither constituted or organized to take on this function. It is not a legislative function, both in terms of appropriate timing in instituting the controls and removing them, since only the Executive can determine the appropriate time for instituting the controls and removing them, and only the Executive is equipped to determine and establish the necessary rules and regulations to carry out the law once imposed.

The majority of your committee who voted for title II of H.R. 17880 deemed it highly improper for the Congress to mandate such authority. In supporting this proposal it was argued that one could easily envision the possibility that, once having imposed wage-price-salary-rent freezes, a few months hence it would be necessary to remove them in whole or in part. But if the Congress had mandated such action through to the termination date of February 28, 1971, as set forth in the bill, it would well be days or weeks before such action would be rescinded by the Congress if needed and, indeed, the Congress itself may not be in session when it would be appropriate to remove such controls.

For these reasons, the majority of your committee feels that such standby authority must be left to the discretion of the President and not mandated.

In summary, our economy has been and is now faced with the most anomalous situation of recession in some quarters with high unemployment rates, lack of productive activity in the homebuilding and other essential industries, and, at the same time, substantial inflation in terms of continued rapidly increasing prices and all-time high interest rates. This anomalous situation can be corrected by giving the President the appropriate tools to correct the situation. These legislative tools include the selective credit controls given to the President in Public Law 91-151, enacted last year, and the proposed wage-price-salary-rent discretionary authority proposed in this legislation.

With these tools the President will have a full opportunity to bring the economy under control and put an end to the twin economic evils of inflation and recession which has plagued the country in recent months.

MINORITY VIEWS

H.R. 17880 as reported is a better bill than the bill which was introduced. It has received our support because without it the Defense Production Act of 1950 would expire. However, we cannot concur with the majority views on title II—Cost of Living Stabilization.

* * * * *

Title II bears the innocuous title "Cost of Living Stabilization" but actually conveys authority on the President to freeze prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970 until February 28, 1971, slightly after the upcoming election. Considering that titles of bills should relate to the subject matter following in a manner that identifies it correctly

we might better have entitled this unwanted and unneeded title as the "Election Year Squeezeplay" or "Devious Democratic Demagogery." The fact of the matter is that the only real need for this authority is the majority's need for some means of screening the root causes of current economic problems from the electorate. Attacks on the President for not using this authority, which he has announced in advance he will not use, will be the device for creating the screen.

The action of the majority in pushing this proviso through the committee on a straight party line vote parallels its action last December in enacting standby credit controls. The only note of gratification is that these new authorities will be less useful as a political gimmick because despite all criticisms, irresponsible congressional spending and the heritage of huge war expenditures, the President's program to control inflation is now paying off. There is really no doubt that responsible fiscal and monetary policies are a more effective and economical means of controlling inflation than administered controls over prices, wages, and credit.

It is interesting to note that during World War II over a quarter million people were involved in administering the price stabilization effort. During the Korean war a much smaller and less ambitious control effort employed more than 17,000 people and cost over \$137 million. It is totally unrealistic to enact control authority for a 7-month period such as this bill would do. Is there anyone so foolish to think that the bureaucracy to administer the controls could even be assembled in this time?

The case against wage and price controls is no better summarized than in the 1969 report of President Johnson's Council of Economic Advisers, which stated:

Mandatory price and wage controls * * * freeze the market mechanism which guides the economy in responding to the changing pattern and volume of demand; they distort decisions on production and employment, they require a huge and cumbersome bureaucracy; they impose a heavy and costly burden on business; they perpetrate inevitable injustices. They are incompatible with a free enterprise economy and must be regarded as a last resort appropriate only in an extreme emergency such as all-out war.

WILLIAM B. WIDNALL.
FLORENCE P. DWYER.
SEYMOUR HALPERN.
W. E. BROCK.
ALBERT W. JOHNSON.
J. WILLIAM STANTON.
CHESTER L. MIZE.
BENJAMIN B. BLACKBURN.
GARRY BROWN.
LAWRENCE G. WILLIAMS.
CHALMERS P. WYLIE.
MARGARET M. HECKLER.
WILLIAM O. COWGER.
PHILIP M. CRANE.
CLARK MACGREGOR.

ADDITIONAL VIEWS ON H.R. 17880

H.R. 17880 has as its primary purpose, the extension of the Defense Production Act of 1950 from June 30, 1970, to June 30, 1972. With this purpose, no one on the Banking and Currency Committee disagrees. With respect to the extraneous provisions which have been added to this "vehicle," there is much disagreement of varying severity.

This disagreement occurs on the question of adoption of cost-accounting standards and by whom such standards shall be developed; and, on the issue of enactment of standby authority in the President for imposition of wage and price controls.

* * * * *

WAGE AND PRICE CONTROLS

At the outset, let me say that my constituency on the only two occasions in the last 3 years when I have asked the question on my legislative questionnaire, has by a wide plurality, voted for the imposition of wage and price controls.

When I let my irritation over inflation prevail over my judgment, I often say to myself, "Yes, let's invoke them." But even as a rather mediocre student of economics, I know that wage and price controls are not the answer to the type of economic destabilization we are now suffering.

Yet, I am willing, if are my colleagues, to bite the bullet and put the machinery of controls into being. But, I refuse to aline myself with my spineless colleagues who would pass the buck to the President as many of them did in similarly broad language in the Gulf of Tonkin standby authority.

The total insincerity of title II, the wage and price control provisions, of this bill is pointed out in the minority views in this report.

The almost unlimited grant of authority to the President to impose and implement wage and price controls provided for in title II would be considered ludicrous were it not so serious.

At a time when the electorate and some Members of Congress are vehemently criticizing the failure of the Congress to assume greater authority and responsibility in the warmaking power the President is exercising in international affairs, it is almost unbelievable that anyone would suggest the Congress totally abdicate its responsibility and retain no authority with respect to the power of the President to wage war on the economy.

It has been suggested that the wage and price control provisions of title II are similar to those previously enacted by the Congress. This is pure hogwash. Any examination of economic controls enacted in the past would establish that on those occasions when legislation of this nature was enacted, section after section of guidelines, standards, limitations, and directions for implementation were included.

To hear the chairman of the Banking and Currency Committee unabashedly praise this legislation when he spoke on the House floor the other day, was insulting to the intelligence of the membership of this body. How he could keep a straight face while performing such a rank political ploy defies explanation.

As I have previously indicated, I have serious doubts about the wisdom of imposing wage and price controls because I believe they would be counterproductive in our effort to stem inflation. I, therefore, believe title II of this legislation should be stricken. If title II is not stricken, then it is imperative that the amendment I will offer be adopted.

Briefly stated, my amendment provides the standby authority necessary for the invoking of wage and price controls. But there is a significant difference between my amendment and the provisions of title II. My amendment retains authority in the Congress to invoke a wage and price freeze and then grants to the President the authority to make adjustments in wages and prices necessary for the stabilization of the economy and prevention or elimination of inequities within our wage and price structure.

To permit timely action, my proposal delegates to a joint committee consisting of the Joint Economic Committee, the Speaker and minority leader of the House, and the majority leader and minority leader of the Senate, the authority to determine when and if the wage and price control provisions shall be activated.

There are those who may argue that this delegation of authority to a joint committee of the Congress is improper or even unlawful. Such an argument is clearly without merit. Not only is our statute law full of examples of such delegation of authority but, in addition, the theory has become an axiom that any authority of this nature which may be delegated to the executive branch may be retained by the Congress and may be exercised to a statutorily designated committee or body of the Congress.

In essence, my amendment puts the issue of standby authority for wage and price controls in an absolutely clear context. If such standby authority is to be enacted, responsible Members of Congress will support my amendment and those who only wish to play politics will oppose it.

GARRY BROWN, (Michigan).

We concur in these additional views.

LAWRENCE G. WILLIAMS.
ALBERT W. JOHNSON.

NAM SURVEY

[From NAM (National Association of Manufacturers) Reports, Vol. 18, No. 40, Oct. 1, 1973]

FIRMS URGED TO COMMENT ON IMPACT OF CONTROLS

An NAM task force will soon be meeting with top executives from the Cost of Living Council to discuss modifications in current Phase IV regulations as well as to urge the council to proceed rapidly with its plans for decontrol. Prior to this meeting, the NAM will develop data from members on problems companies have experienced as a result of price and wage controls.

NAM urges all member firms to respond as quickly as possible to the following questions:

- What products, if any, is your firm no longer producing due to the influence of controls?
- What materials, if any, has your firm found to be in short supply, and how extensive are these shortages?
- To what extent, if any, has your firm increased exports (percentage increase) within the last year?
- To what extent have the normal business practices of your firm been interrupted as a result of controls?
- Briefly describe any highly significant problems caused your firm as a result of controls—Have you got a horror story to tell us?

Based upon the data received the NAM will attempt to statistically demonstrate the extent to which harm has been caused as a result of controls. Responses should be addressed to Jeffrey P. Eves, director of economic stabilization, at the NAM Washington office and be received no later than Oct. 10.

All company names and information submitted will be treated in a confidential manner.

Industry Survey on Wage and Price Controls

Financial Effects
Economic Effects
Supply Effects

NATIONAL ASSOCIATION OF MANUFACTURERS



December 21, 1973

To The Reader:

In August, 1971, for the first time in the history of the United States, President Nixon imposed wage and price controls during a period of peacetime. This "temporary" program has been with us ever since, through two freezes and four phases.

The NAM has cooperated with the control agencies in the hope of minimizing its damaging effects and maximizing its possible short-term beneficial impact. However, the Association continually emphasized its view that such a program was inconsistent with the fundamentals of free enterprise and was acceptable only for a brief temporary period. At this juncture the NAM has concluded that controls have outlived any usefulness they may once have had, and we are totally and unreservedly opposed to their continuance.

The Government's controllers have taken the view that the success of the stabilization program is to be measured by the rate of increase in the monthly Consumer Price Index. While we do not totally disagree with that view, we believe that other factors exist that have an even more profound effect on the longer term success of the United States economy. Specifically, we speak of the effect controls have had on such factors as production, employment, and capital investment.

It is for that reason that the NAM undertook this study of the effects of controls on the production facilities of this country. So far, as we know, this is the first such survey ever conducted from either inside or outside of the government.

Based on the results of this survey, it appears obvious that the stabilization program's few minor accomplishments have been enormously outweighed by its many damaging side effects. It is for this reason that the NAM has urged and will continue to urge for an immediate total elimination of the entire wage and price control program.

Sincerely,

E. D. Kenna
President
National Association of Manufacturers

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ABOUT THE NAM SURVEY ON CONTROLS

On November 16, 1973, the NAM mailed out letters and questionnaires to approximately 2300 member firms or about 18 percent of our entire membership asking for the response to a request for 59 separate pieces of information concerning corporate experience with, and views on, wage and price controls. This questionnaire is reproduced in the synopsis section of this pamphlet. Approximately 23 percent of those polled responded with answers prior to the information cut-off date on December 17.

The only criterion used in the selection of the firms to be polled was total annual revenue. All of our 1000 largest members were surveyed. Most of these firms have total annual revenues in excess of \$50 million. The remaining 1300 firms were selected on a random sample basis from the rest of the membership. Forty-four percent of the responses were from firms having less than \$50 million in sales which approximately corresponds to the 45 percent contribution to the GNP made by firms of this size. Among the larger firms, 27 percent of all industrial firms in this country having in excess of \$500 million and 23 percent of all firms in the country having in excess of \$100 million in total annual revenues (as determined by the Fortune 500 listing) responded to the survey. 19.5 percent of the firms in our survey employed more than 10,000 persons. 24.4 employed between 2500 and 10,000. 52.5 percent had more than 60 but less than 2500 employees while the remaining 3.6 percent had fewer than 60 employees.

The survey was not strictly limited to "manufacturing" or industrial firms. Included also in our tabulation are a small number of responses from public utilities, airlines, insurance companies, wholesaling and retailing operations, banks and other financial institutions, and agricultural processors.

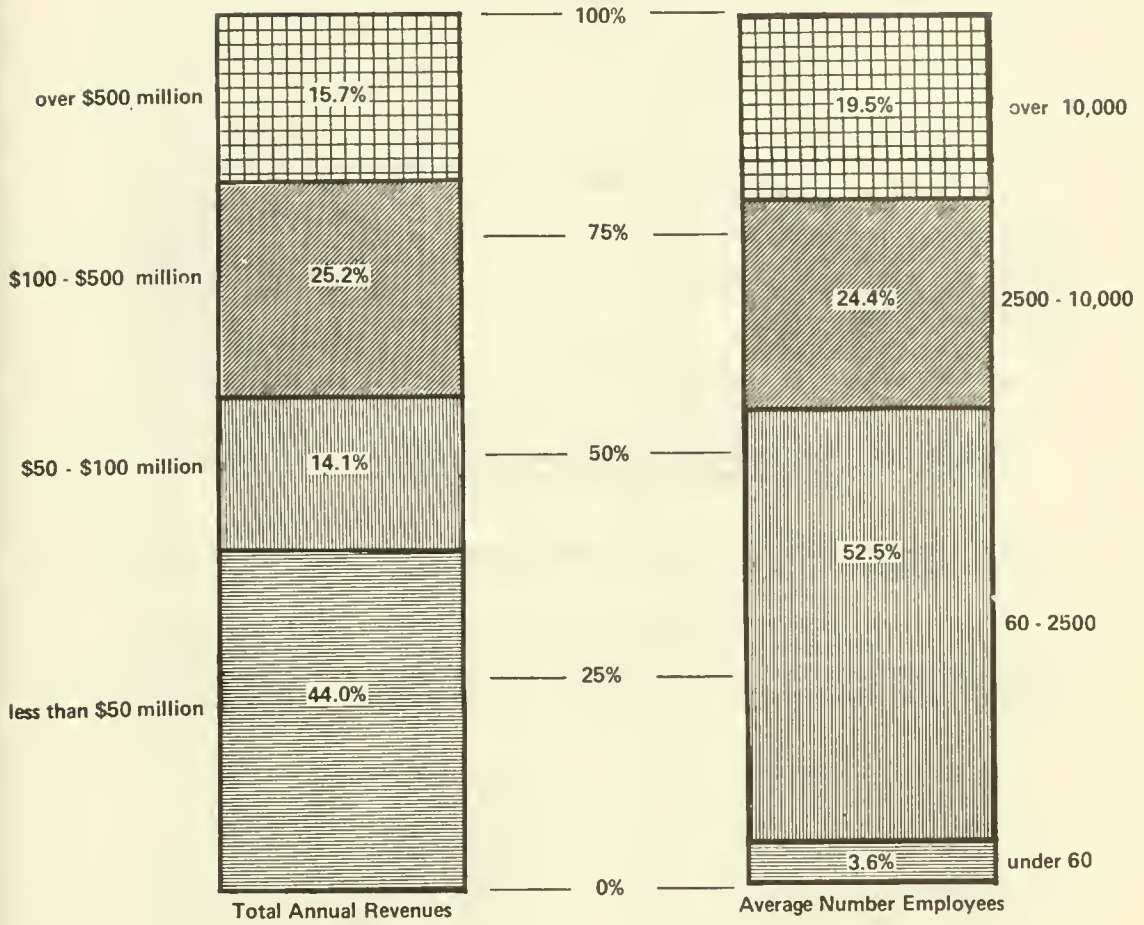
The questionnaire was developed by the NAM with the advice and assistance of experts from industry and the federal government. Many of the questions, in fact, were included at the specific request of and in the same form as suggested by the Cost of Living Council. Every possible effort was undertaken to assure the fact that the results expressed in this study accurately reflect a legitimate cross-section of the entire economy.

Because of the diversity of firms responding to the survey, there are literally hundreds of different ways in which this information can be broken down. However, for purposes of this study, we have chosen to present the data from two different views -- from the view of "small firms" i.e., those having less than \$50 million in annual revenues and from the view of "large firms" i.e., those having in excess of \$50 million in revenues. Where the variance is minor (less than 3%), we will lump the data together. This report is divided into eight sections, each dealing with a different aspect of controls. Appropriate and significant comment is included in each section to show the relationship one set of statistics bear to another.

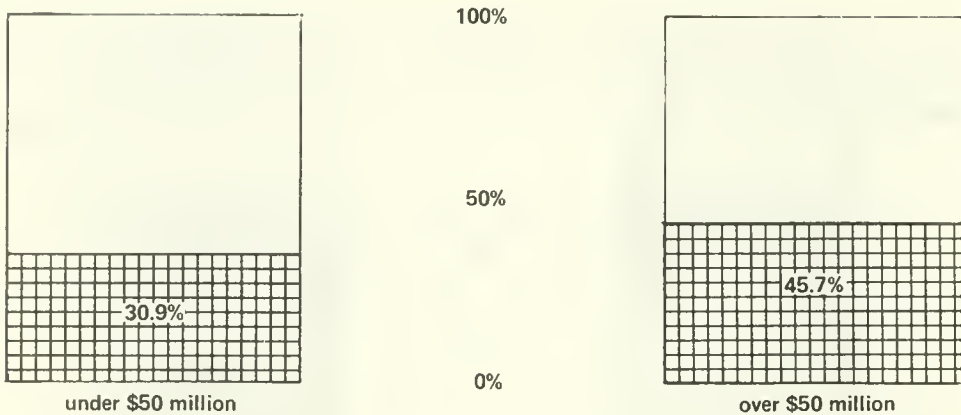
Any inquiries concerning this subject should be directed to the National Association of Manufacturers, 1776 F Street, NW, Washington, D.C. 20006.

Jeffrey P. Eves
Director, Economic Stabilization
National Association of Manufacturers

SIZE DISTRIBUTION OF SURVEY RESPONDENTS



PRODUCTION INTERRUPTIONS AND CURTAILMENTS



PERCENT OF FIRMS REDUCING OR ELIMINATING OUTPUT OF PRODUCTS OR SERVICES AS A RESULT OF CONTROLS.

All firms were asked: "Has your firm eliminated or reduced its output of goods or services as a direct or indirect result of wage and price controls?"

As indicated, a substantial percent of the reporting firms answered that they had. The products whose output was thus eliminated or curtailed included many of considerable economic significance. The following is a list of products mentioned by eighty-three firms which gave a positive answer to this question:

Jacks	Polyester resins
Paint brushes	Surfactants
Logs	Printing papers
Engine bearings	Writing papers
Pistons	Tubular products
Plastic products	Building wire
Wire and Cable	Light gauge steel products
Copper tube	Tires
Steel Conduit	Latex foam
Plastic pipe	Industrial rubber products
Tires	Plastic materials
Rubber parts	Wiring devices
Cheese	Lighting fixtures
Ice cream	Cable
Milk	Industrial controls
Consumer and industrial mixes	Polyester resins
Processed vegetables & meat	Lumber

Bond paper	Steel
Giblet wrap	Lumber
Computer paper	Nitrogen
Kraft paper grades	Books
Business papers	Power Transmission Products
Asphalt Laminated paper	Air conditioning coils
B&A and P&I film	Reinforcing bars
Speciality paper	Glass containers
Refinery products	Truck trailers
Organic chemicals	Plastic container
Copper fabrication	Paper
Private label shortening	Corr boxes
Margarine	Synthetic rubber
35 - 40 animal feeds	PVE resin
Coatings	Polyestic resin
Steel office chairs	Plastic
Zinc Die cast fittings	Phonograph records
Steel desks and Files	Tapes
Livestock feed	Rubber
Bismuth	plastic
Fumaric Acid	Canned foods
Selected converted paper grades	Frozen foods
Hamburger	Bakery products
Aluminum	Paper
Copper	Paperboard
Zinc	Bags
Fruit cake	Chemicals
Steak dinners	Household goods
Printing papers	Cutting tools
Woodpulp	Electrical contacts
Industrial spices	Tantalum Carbide
Mayonnaise	Metal fabrications
Fasteners	Soap
Plastic panels	Unfinished petroleum
Hardboard panels	Paper
Heating	Business forms
Fittings	Heating equipment
Registers	Air conditioning
Air conditioning	Plastic
Acrylic products	Meat
Surfactants	Animal feeds
Ion exchange resins	Grades of Wheat & Durum Flours
Plastics	Retail steel products
Steel	Automotive rubber goods
Steel Pipe and Tubing	Plastics
Beef and Dairy feeds	Lube oils
Greeting cards	Flanges & Well points
Gift wrappings	Log lighters
Fixtures	Machine tools
Footwear	Textile machines
Steel forgings	Hydraulic valves
Metal stampings	Hydraulic pumps

Metal doors	Plastic components
Hardware	Metal components
Expansion Nuts	Carcass beef
Roof Bolts	Pork
Provolone cheese	Isopropyl alcohol
Romino cheese	Maleic alcohol
Mozzarella cheese	Electrical outlet box
Clinch nuts	Reinforcing bars
Textile fibers	Five-cent candy bars
Chemicals	Sheet metal items
Steel Pipe couplings	Pig iron
Bugie wheels	Scrap steel
Sprockets	Alloys
Stainless Steel	Upholstered wood household
Industrial household sponges	furniture
Envelopes	Wood furniture frames for
Business forms	upholstery
Plywood	CFR Vehicles
Exterior Fiber boards	Concrete carriers
Electricweld tubing	Snow plows
Control centers	OEM-Oil fields
Metal Stampings	OEM - Utility
Castings	Cement
Pulp	Steel
Waste paper	Fertilizers
Steel rod	Telecommunications
Zinc coatings	Power conversion equipment
Vinyl coatings	Misc. publishing
Infants shirts	Commercial printing
Shears, Scissors	100% cotton jeans
Tool holders	Leather gloves
Eye bolts	Shoes
Pipe Threaders	Pigskin leather
Lathe dogs	Cement
Consumer-Painter products	Paperboard
Chemical coating	Folding
Brake Lathes	Corrugated cartons
Electronic components	Building products
Foundry	Wood furniture
Mayonnaise	Sporting goods
Salad oil	Refined oils
Builders hardware	Vegetable oils
Transportation	Construction
Mechanical control levers	Cylinder operations
Oil seals	Biscuits
Neorrene	Fine paper
Feed ingredients	Casters
Copper	Reinforcing structural steel fabrication
Canned Vegetables	Molded products
Pork skins	Industrial refined sugar
Fig boc	Metal cans
D.E.M. Heat Transfer	Auto. temperature controls
Ice machines	Paperboard containers
Heating	Plastic
Electronic organs	

Obviously, such statements become more meaningful when the importance of those production reductions are measured. 22% of firms responding asserted that the products listed above were a very significant factor in total corporate sales. 37% of the companies declared them moderately significant and 27% said they were marginally significant. In understanding this information, it may be useful to recognize the \$10 million in sales to a billion dollar firm might be considered insignificant by that firm, yet could be highly significant in terms of total sales to the customers now unable to obtain the product.

There had been many reports of firms stopping production of certain products within a given product line because of controls, because of shortages attributable to controls, or because controls have forced companies to eliminate less profitable items. Frequently this has put the purchaser of these products in the position of having to upgrade to a higher quality product at a higher price. A classical example is the paper situation where buyers, in order to obtain their paper requirements had to settle, in some cases, for a higher basis weight grade than was necessary and at increased cost.

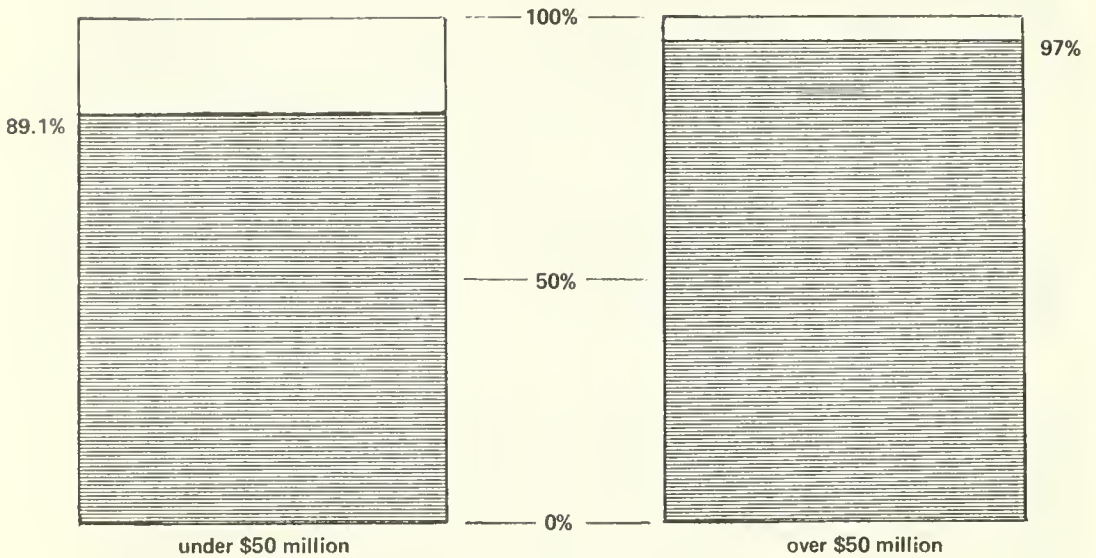
Another example deals with the manufacturer of steel reinforcing bars, used with concrete in construction. "Re-bars," as they are commonly referred to, are generally considered to be a low profit item for the steel companies, and therefore, since the price was not allowed to increase, demand soon outstripped supply and the steel companies were left with no incentive to produce the product. The regulatory provision allowing firms to obtain freedom from the profit margin restraint, provided they kept price increases within certain limits, led many firms to rely more heavily on higher profit items and provided little incentive for the continuation of production on the lower profit items. Moreover, many firms dropped entirely the production of items that had been, and probably would for some time have continued to be, carried at a loss.

The larger firms had half again as many production interruptions and curtailments as the smaller firms. It is impressive that one in three small firms and almost half of all large firms took such actions because of controls. The chart does not identify cutbacks which occurred for reasons other than the influence of controls. The fact remains clear, however, that an alarming number of firms were forced to reduce output because of controls.

Approximately 50% of all firms acknowledging cutbacks indicated that production was interrupted or curtailed because of the unavailability of raw materials. In the greater majority of cases, these shortages resulted in production interruptions and reductions rather than in total curtailments. Slightly more than 44% attributed the cutbacks to uneconomical production where economic return does not justify production activity in light of controls. The remaining 6% of firms gave other reasons for these actions. The most frequent response in the "other" category was that firms had or were about to exceed their allowable profit margin--a penance to be paid for efficient production.

Only a small number of firms were able to expand other product lines to compensate for the interruption or curtailment of products due to controls. 8.8% of the large firms and only 2.7% of the small firms reported expanding other lines to make up for cut-offs. 25.3% of the small firms and 33.1% of the large firms were able to make partial restoration. But a majority of 58.1% of large firms and 72% of small firms reported not being able to expand other lines to compensate, even on a partial basis.

SHORTAGES

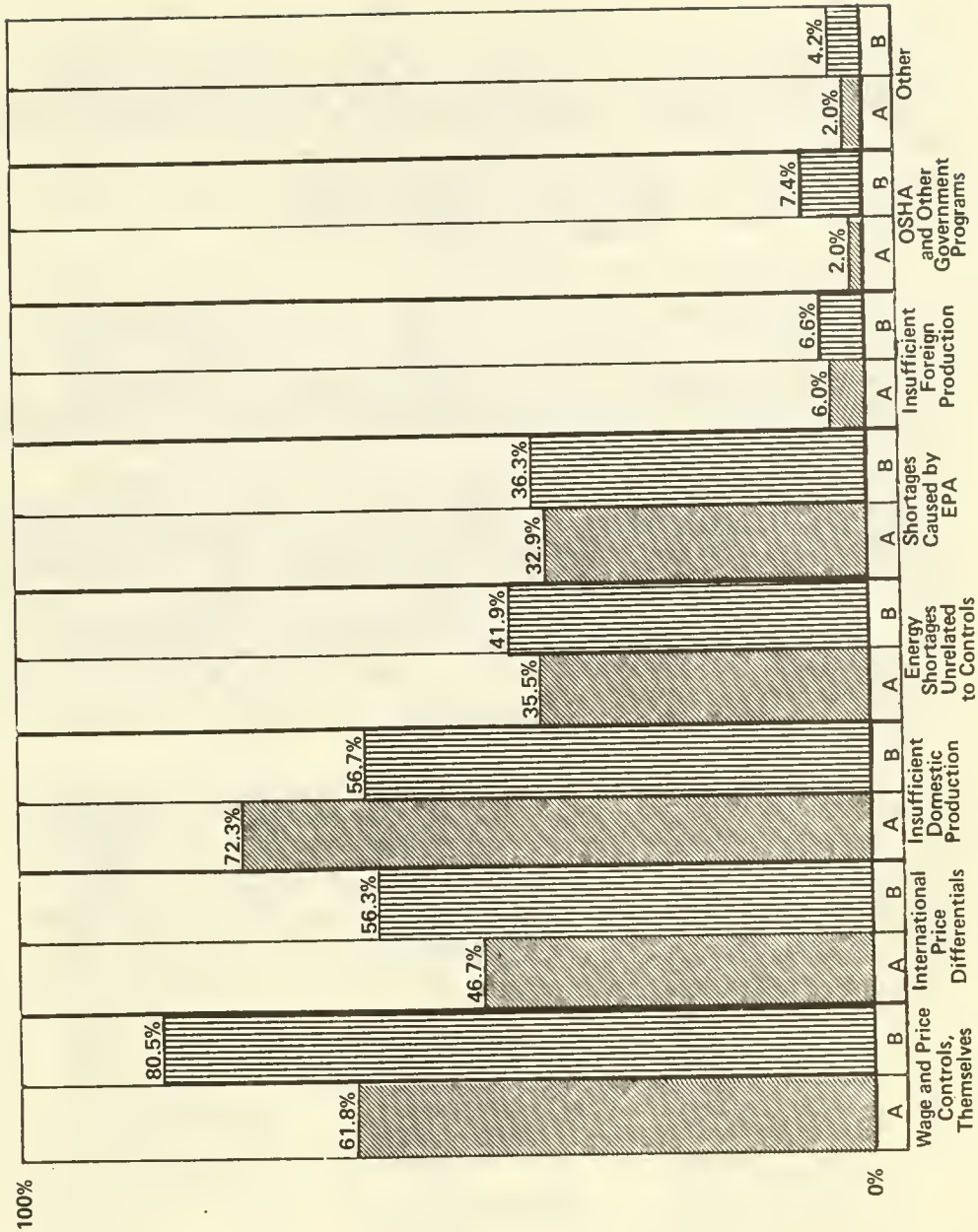


PERCENT OF FIRMS EXPERIENCING UNUSUAL DIFFICULTY IN OBTAINING ITS REQUIREMENTS OF IMPORTANT MATERIALS OR SUPPLIES .

As demonstrated by the above graph, all firms were asked: "Has your company experienced unusual difficulty in obtaining its requirements of any important materials or supplies?" Practically all large firms (97%) and the vast majority of small firms (89%) said, "yes".

Firms responding in the affirmative were then asked to name the principle influencing factors to which the shortages were attributable. The responses are visually displayed on the following graph:

PRINCIPLE INFLUENCING FACTORS TO WHICH SHORTAGES ARE ATTRIBUTABLE



A - Firms under \$50 million
B - Firms over \$50 million
* - Total Exceeds 100% Because Firms Were Allowed to Choose Several Factors

Clearly, the largest single factor contributing to the shortage situation has been the price control program itself. The third largest contributing factor is international price differentials, which is itself a result of the imposition of controls. Prices are not, nor can they be controlled on exported or imported (first sale only into U.S. commerce) goods. There has been a great incentive to export because firms could get a better price in a foreign market. Most prices for internationally traded commodities have increased sharply in recent years yet the domestic U.S. price has been artificially held down. Many other goods are not attractive to U.S. purchasers because of the artificially low prices on domestically produced finished goods.

That controls contribute significantly to shortages of products traded in international markets is clear. Yet an important question which needs to be asked concerns the extent to which controls may be causing damage to the U.S. competitive position in foreign trade. So, all companies were asked: "Do you feel that controls are damaging the United States competitive position in foreign trade?" While approximately 40 percent of the companies said they were "uncertain", 45 percent believed that damage was being done. Only 15 percent of the firms didn't think that price controls were damaging the U.S. competitive position in international trade.

The second greatest cause of shortages, according to the firms surveyed, is insufficient domestic production. Controls have been responsible for this area, also. For additional information on domestic production, refer to the Capital Expansion and Business Practices sections of this study.

Energy shortages unrelated to the stabilization program is the fourth largest contributor to overall shortages as one in three firms list it as an important factor. Because this study covers a period of time from late November and December, 1973, the impact of energy may be underestimated when viewed in retrospect. Certainly, the energy situation will have a greater effect in the foreseeable future.

It is nevertheless obvious that the second and third major factors are outgrowths of the first and a prompt termination of controls would substantially ease the shortage situation. But to further demonstrate that point, all firms were asked: "Assuming controls continue, what do you believe will be their effect on the shortage problem in the next 6 months?" 32.8% of the larger firms said the shortage situation would become "critical"; 52.3% said it would become "worse", (but not critical); 14.5% reported it would remain about the same; and the remaining less than 1/2 of 1% (.4%) said it would improve. The small firms reported in a similar manner.

32.8% -- It will become critical
 52.3% -- It will become worse
 14.5% -- It will remain about the same
 .4% -- It will improve

in shortage problem in 6 months if controls continue

We then turned the question around and asked: "Assuming controls were promptly ended, what do you believe the effect in the shortage problem would be within the next 6 to 12 months?" The results were very much the opposite.

3.9% -- It will become worse
 12.1% -- It will remain about the same
 58.4% -- It will slightly improve
 25.6% -- It will greatly improve

Shortage problem in 6-12 months if controls were promptly terminated

85.1% of all firms responding predicted a serious worsening of shortages if controls continued, and at the same time 84% of all firms say that there would be an improvement in shortages problem if controls were promptly ended.

We asked all firms which were experiencing shortages just because of wage-price controls to list the important materials or supplies where the problem existed. Each firm was also asked to classify the products it listed by the degree of difficulty in obtaining those materials as "critical", "significant" or "moderate". The responses from 155 firms are summarized on the next several pages. The products are listed under separate headings by degree of difficulty in obtaining them. A product may appear several times on any list because it was mentioned by more than one firm as being short in supply.

CRITICAL

Zinc	Diesel Fuel	Molds & Dies
Aluminum	Steel	Forgings
Nuts	Steel bars	Rubber
Castings	Steel	Rubber Substitutes
Lumber	Aluminum	Copper
Mesh	Silver contacts	Silver
Zinc dust	Plastic resins	Steel
Asphalts	Natural castings	Castings
Cotton	Coke	Steel
Vinyl resins	Pig iron	Reinforcing steel
Copper	Steel scrap	Nylon
Paper	Phenolic resin	Rayon
Steel	Steel	Cotton
Paper products	Low density	Steel
All steel related	Polyethylene	Paint
products	Plastic resins	Mild steel
Grinding wheels	Textiles	lumber
Steel	Plastics	Alum. wrought
Copper	Packing materials	Plastics
Zinc	Resins	Electric controls
Aluminum	Pigments	Vinyl
Steel	Plastic materials	Petroleum
Wire	Cartons	Copper
Steel	Alum. ingot	Steel

Petroleum base products	Caprolactum	Bearings
Small electric motors	Polyester Chips	Paper
Resins	Zinc	Steel Engines & motors
Electronic components	Aluminum	Natural gas
Castings	Coke	Fuel oil
Bond paper	Pig iron	Chlorine
Wood pulp	Ferro Silicon	Screws & Fasteners
Pulp	Powdered metal	Ferro alloys
Base paper	Stainless steel	Ammonia
Monomers	Compressors	Paper & Foil
Steel wire	Electric heating	Cotton
Agricultural products	Castings	Polyvinyl Chloride
Tinplate	Steel scrap	Shrotening
Vinyl Resin	Pig iron	Corrugated paper
Oil extended rubber	Nuts and bolts	Polystyrenes
Styrene	Packaging material	Glycerine
Benzene	Pulp wood	Propolyne Glycol
Butadiene	Wood pulp	Steel
Aniline	Chlorine	Kraft paper
Phneol	Zinc	Steel
Plasticizers	Metals	Engines
Stearic Acid	Paner	Forging & castings
Poles	Acitic Acid	Bearings
Copper	Bytenol	Tires
Aluminum	Tartaric acid	Elec. motors
Paper	Benzene	All hardware items
Chemicals	Fuel oil	Steel
Steel	Die cast zinc	Vinyl
Polyvinyl Chloride	Petrochemical	Petro-chemical
Chicken	Titanium dioxide	Raw pigskin
Lamb	Fertilizer	Polymers
Fibre	Tin plate	Plastic resins
Engines	Cartons and boxes	Steel & iron products
Castings-Misc.	Phosphates	Scrap
Stainless steel	Cotton ties	Coal
Castings	Urea	Coke
Pulp	Meat scraps & bone meal	Alloys
Iron steel scrap	Casein & milk powders	Petroleum products
Zinc	Egg yolk solid	Non-ferrous metals
Steel	Fish meal	Current-carrying devices
PVC	Copper	Paper
Paper	Steel	Steel
Particle Board	Chemicals	Chemicals
Lumber	Alum. extrusions & Fabrication	Fuel
Steel	Fuel	Lumber
Plastic	Pulp	Copper
UREA	Petro-chemical materials	Aluminum
Sytrene	Steel	Oil products
Acetylene	Springs	Gasoline
Ethylene oxide	Castings	Steel
Butanol	Petro chemicals	Paper
Ammonia		Styrene
		Polystyrene
		Poly-vinyl Chloride

Neoprene	Ferro alloys	Phenolic products
Plastics	Pig iron	Ketone products
Steel	Petroleum	Aromatic solvents
Hardware	Steel carbon wire	Propane
Joists	Paper box board	Pulp
Decking	Tablet paper	Waste paper
Zinc	Vinyl page material	Chlorine
Salvents	Steel	Styrene
Lumber	Pigments	Ethylene
Zinc	Anti-freeze	Phenol
Linear Polyethylene	PVC	Zinc dust
Engines	Aluminum	Copper
Axles	Copper	Chemicals
Castings	Carbon	Steel mill products
Maleic alcohol	Nylon yarn	Copper cable
Isopropyl alcohol	Galv. steel	Synthetic rubber
Pig iron	Phenolic Modling mfls.	Berrings
Ferro Silicon alloy	Phenolic resin	Motors
Neoprene	PVC	Steel
Chemicals	Stainless steel	Machine parts
Chemicals	Castings	Fuel oil
Solvents	Natural gas	Chemicals
Plastic	Sheet steel	Steel
Steel	Carbon paper	Pork pollets
Stainless steel	Cotton string	Resins
Castings	Wire	Fuel
Aluminum	Retro chemicals	Chemicals
Copper wire	Trucks	Tallow
Electric motors	Fork-lift trucks	Plastics
Berrings	Fuel	Fats & Oils
Paper	Concrete pipeline	Butane
Grey iron and Aluminum	Steel reinforcing bars	Butadiene
Steel	Steel	Styrene
Plastics	Pig iron	Zinc oxide
Iron castings	Steel sheet	Resins
Steel	Cedar lumber	Copper
Aluminum	Hardwood stairwork	Acetone
Syn. fibers	Sheet steel	Electrical items
Cotton	Aluminum extrusions	Dectronic devices
Titanium dioxide	Tolnol	Labor
Red iron oxide, etal	Zylol	Aluminum redraw rod
Vinyl Resins	Styrene monomer	Electrical steel
Solvents	Plastics	Galvanized steel
Steel rods	Electrical components	Aluminum
Steel	Aluminum Ingot	Steel tubulars
Rod-steel	Aluminum bar & tube	Aluminum
Sulphite pulp	Petroleum base solvents	DiCalcium Phosphate
High-grade waste paper	Plastic resins	Steel products
Rolled steel	Castings	Gasoline

SIGNIFICANT

Steel pipe	Poles	Ferro alloys
Steel fittings	Copper	Chemicals
Special wire	Steel	Corrugated boxes
Solvents	Tubular goods	Soda ash
Copper	Chemicals	Phenolic resin
Aluminum	Steel Fabricated	Paper
Ferro scraps	items	Insulators
Cotton	Pulp	Carbon steel
Leather	Scrap iron	Paper board
Gold salts	Coke	Axles
Copper	Scrap paper	Castings, Mal.
Steel	& Board	Steel
Cotton denim	Titanium	Conper products
Treated wood poles	Coal; fuel oil	PVC
& Crossarms	Chlorine & Caustic	Solvents
Transformers	Polyethane	Plastic resins
Steel	Chlorine	Paper pulp
Paper	Caustic soda	Paperboard
Petroleum	Wood Pulp	Packaging
Zinc	Sodium Chlorate	Wastepaper
Paper	Fine & Speciality	Papermill Chemicals
Electrical components	papers	Natural Gas & Fuels
Mining	Industrial chem.	Resins-phenol & urea
Capital goods	Upholstery Material	Pigments
Tires	Sheet & coil steel	Chlor/alkali
Paper	Screws	Cutting wheels
Plastics	Cartons	Cobalt oxide
Wood fibre	Paper	Ketone
Reclaimed fibre	Molasses	Titanium
Paper board	Ethyl Alcohol	Special steels
Castings	Silver	Fuel
Forgings	Copper	Petro chemical
Paper	All materials used	Natural oils
Wood products	in construction	Malt
Wastepaper	Wastepaper	Pulp
Plywood	Starch	Crude oil-Unfinished
Grey iron castings	Steel	Chemicals
Zinc	Wooden Plugs	Wood
Reinforcing steel	PVC	Steel
Engines & motors	Phenolic Resins	Motors
Plastic	Copper	Castings & Forgings
Alcohol	Steel	Livestock
Bearings	Lumber	Steel
Paper	Plastics	Castings
Glycerine	Beef	Aluminum
Paper	Chlorine	Semi-conductors
Resin	Titanium Dioxide	Cans, glass
Steel	Caustic soda	glass containers
Electrical components	Starch	Paper
Copper	Envelope paper	Wood
Plastics	Plastic	DeHydrated Alfalfa Meal
Cotton	Fuel oil	Steel products

Paper bags	Steel	Casters
Plywood	Steel	Lumber core
Hot rolled steel	Steel pipe	Coke
plate	Steel	Milk
Heat exchanger tubes	Forgings	Plaster
Aluminum	Copper related	Styrene
Steel bars	items	Raw materials used in
Nuts and Bolts	Malleable iron	plastic parts
Polystyrene	Acetate	Cotton
Steel	Paper	Pulp
Steel	Boxes	Steel scrap
Resin	Cartons	Fibre
Aluminum	Steel	Steel
Structural plate steel	Cartons	Lumber
Aluminum	Steel	Paper
Box board	Copper	Carbon bars
Pig iron	Woven cloth	Castings
Cast Scrap	Packaging supplies	Construction mat.
Benzene	Tagboard	Pipe Fab. materials
Zinc	Cloth tag stock	Truck engines
Copper	Bond paper	Lumber
Steel	Steel bars	Copper
Plastics	Steel pipe	Steel
Synthetic rubber	Zinc	Nitrogen
Steel	Vinyl Monomer	Paper
Steel	Paraffin	Copper
Plastic	Potassium Chloride	Aluminum
Fuel oil	Titanium	Steel
Paper bags	Caustic	Resin
Fuel	Fuel oil	Oil products
Cartons	Copper	Adhesives
Copper	Zinc	Steel-hot rolled sheet
Packaging material	Plastic	Plastics
Filtering materials	Propane gas	Silver contacts
Wood poles	Iron & Steel scrap	Copper
Cross arms	Chrome Stainless	Pig iron
Steel products	Tallow	Motor shell steel
Propane	Benzene	PVC
Fuel oil	CRS sheet, strip	Neoprene
Wire conductor	and bars	Solvents
& Cable	malleable iron ctgs.	Aluminum
Zinc oxide	nonferrous forgings	Index paper
Copper	screw mach. products	Tablet paper
Zinc	Copper	Acetate sheets
Aluminum cable	Plastics	Cotton
Wood products	Paper	Ferro alloys
Chemicals	Castings	Steel
Foundry products	Engines	Axles
Paper products	Axles	Engines
Steel	Transmissions	Paper
Aluminum	Benzene	Lumber
Standby fuel	Cellosolve acetate	Copper

MODERATE

Hardware	Steel	Polyester resin
Brass	Paper	Steel
Cement	Alum. Ingot	Polyethelene
Steel	Copper	Brass
Aluminum	Paper products	High speed steel
Natural gas	Reinforcing rods	Chemicals
Castings	Steel	Steel
Steel	Steel	Aluminum
Glass	Cotton	Plastics
Plastics	Steel	Steel
Steel	Fuel	Aluminum
Corn	Lime	Coke
Ammonia	Vinyl	Cable
Steel	Steel	Brass
Glue	Paper	Bearings
Cobalt oxide	Starch	Paper
Steel	Aluminum	Lumber
Aluminum	Dairy products	Beef
Paper	Lumber	Poles
Copper	Tallow	Plastics
Plastics	Brass	Brass
Paper	Lumber	Steel
Plastic	Paper	Pulp & paper
Cotton	Raw pigskin	Cowhide leather
Steel	Raw cotton	rayon fiber
Transformers	Switch gears and boards	Current-carrying devices
Steel pipe	Natural gas	Crude oil
Gasoline	Deisel fuel	Fuel oil
Phosphoric Acid		Steel equipment

Firms were asked to identify the four digit SIC Code of the product whose continued production was jeopardized because of controls. The following is a list of 478 company product lines, some mentioned more than once, as distinguished by four digit Standard Industrial Classification Codes where continued production is jeopardized. This list was compiled from responses from 103 firms.

SIC CODES

3312	3579	3941	2731	3531	3331	3642	3534	3079
3652	3611	3944	2731	3531	3333	3079	3534	2621
3561	3861	3944	5051	3069	3011	2086	2653	3352
3310	3579	3944	5031	2818	3559	2087	2631	3442
3662	3861	3297	5191	3312	2062	3231	3531	2621
3662	3579	3297	5063	3312	2062	2499	3532	2818
2821	3861	3321	5051	3312	2062	3642	3533	2621
2818	3579	3411	7538	3351	2062	2642	2491	2621

3011	5211	3316	5031	3357	2062	3811	3264	2621
2818	2452	3443	5051	3357	2899	3811	3351	2621
2821	3429	3316	5051	3351	2899	2011	3355	2621
2295	3452	3351	5191	3351	3011	2013	2621	2621
3011	3391	3357	3391	3357	3069	2011	3579	2631
3011	3452	2911	3461	3351	3011	2013	3579	4911
3011	2077	3621	3391	2621	3069	3531	3579	4911
2621	2048	3622	3391	2621	3357	3519	3079	4911
2641	3312	2562	3391	2621	3351	3537	3296	4911
2751	3312	2771	2761	2621	3644	3623	3296	3599
2761	1107	2649	2771	2621	3079	3433	2844	2258
2751	1107	2541	2649	2621	3351	3595	2844	2272
2761	3421	2771	2541	2621	3357	3079	2099	2221
2621	3421	2649	2771	2821	3644	2621	2035	2221
2641	3421	2541	2649	2818	3079	2541	3079	3441
3069	2850	2541	2541	2821	3644	2911	2099	3441
3949	2850	3316	2541	2821	3644	2911	2621	3441
3069	2850	3315	3316	2818	3643	2841	2621	2821
3949	3549	2032	3315	2818	3644	2082	2621	2821
3069	3549	2032	2032	2818	3533	2611	2621	2654
4911	2751	2032	2032	2812	3612	2076	2621	2822
2022	3674	3634	2032	2819	3643	2834	2621	1311
2024	3321	3531	3634	3498	3612	2879	2642	1321
2026	2035	3531	3531	3498	3632	2834	3079	2514
2822	2035	3842	3531	3498	3633	2834	3292	2641
2822	3293	3842	3842	3498	3634	2879	2653	2647
2822	3293	3842	3842	2649	3585	2879	2653	2699
3011	3293	2834	3842	2649	3494	2032	2631	2654
3011	3293	3079	2834	2649	3498	2037	2631	2819
2045	2842	3079	3079	2649	2911	2051	2631	2821
5047	2842	3079	3079	2649	2821	2032	2631	2822
2099	2842	3564	3079	2649	2911	2037	2631	2824
5099	2842	3564	3564	3452	3444	2051	2655	2856
2045	3241	2821	3564	3452	2436	2032	3624	2869
2851	3300	2851	2821	3452	2042	2032	3624	2895
2842	3440	2893	2851	3540	2041	2037	2833	2911
2851	3624	2851	2893	2522	5211	2051	2818	3079
3559	3624	2821	2851	2531	2042	3079	2522	3823
3411	2522	2295	2821	3568	2042	2654	3644	4742
3822	2531	2818	2295	3568	5211	2647	2522	4789
2655	3461	2851	2818	2642	2041	2654	2522	5171
3079	2851	3531	2851	2642	2042	2647	2522	5541
3861	3941	3536	3531	2642	2086	3537	3644	6519
3861	3079	3531	3536	2642	2511	3534	2522	7011
3566	2499	2046	3531	2046	2499	4911	3644	3644

We compared the SIC Codes to the actual product lines represented by these numbers and compiled a separate list of the names of product lines where the continued production is in jeopardy. The following is that list:

Food and Kindred Products

Meat packaging plants
 Sausage and other prepared meat products
 Cheese, natural and processed
 Ice cream and frozen desserts
 Fluid milk
 Canned specialties
 Pickled fruits and vegetables, vegetable sauces and seasonings, and salad dressings
 Frozen fruits, fruit juices and vegetables
 Flour and other grain mill products
 Prepared feed for animals and fowls
 Blended and prepared flour
 Wet corn milling
 Prepared feeds and feed ingredients for animals and fowls
 Bread and other bakery products, except cookies and crackers
 Cane sugar refining
 Vegetable oil mills, except corn, cottonseed, and soybean
 Animal and marine fats and oils
 Malt beverages
 Bottled and canned soft drinks and carbonated waters
 Flavoring extracts and flavoring syrups
 Food preparations

Textile Mill Products

Broad woven fabric mills, man-made fiber and silk
 Warp knit fabric mills
 Tufted carpets and rugs
 Coated fabrics, not rubberized

Apparel and Other Finished
Products made from Fabrics
and other Similar Materials

Women's misses', and juniors' dresses

Women's, misses', and juniors' suits, skirts, and coats
 Hats and caps, except millinery

Lumber and Wood Products, Except
Furniture

Softwood veneer and plywood
 Wood pallets and skids
 Mobile homes
 Prefabricated wood buildings and components
 Wood preserving
 Particleboard
 Wood products
 Wood household furniture, except upholstered
 Metal household furniture
 Household furniture
 Metal office furniture
 Public building and related furniture
 Wood partitions, shelving, lockers, and office and store fixtures
 Metal partitions, shelving, lockers, and office and store fixtures
 Drapery hardware and window blinds and shades
 Furniture and fixtures

Chemical and Allied Products

Alkalies and chlorine
 Industrial gases
 Industrial organic chemicals
 Industrial inorganic chemicals
 Plastics materials, synthetic resins, and non-vulcanizable elastomers
 Synthetic rubber (vulcanizable elastomers)
 Synthetic organic fibers, except cellulosic
 Biological products
 Medicinal chemicals and botanical products
 Pharmaceutical preparations

Chemicals and Allied Products (cont.)

Soap and other detergents except specialty cleaners
 Specialty cleaning, polishing, and sanitation preparations
 Perfumes, cosmetics, and other toilet preparations
 Paints, varnishes, lacquers, enamels, and allied products
 Cyclic (coal tar) crudes, and cyclic intermediates, dyes, and organic pigments (lakes and toners)
 Industrial organic chemicals
 Fertilizers
 Nitrogenous fertilizers
 Agricultural pesticides, and other agricultural chemicals
 Printing ink
 Chemicals and chemical preparations

Petroleum Refining and Related Industries

Petroleum refining
 Lubricating oils and greases
 Products of petroleum and coal

Rubber and miscellaneous Plastics Products

Tires and inner tubes
 Fabricated rubber products
 Miscellaneous plastics products

Leather and Leather Products

Industrial leather belting and packing
 Men's footwear, except athletic
 Women's handbags and purses
 Leather goods

Stone, Clay, Glass and Concrete Products

Glass products, made of purchased glass
 Cement, hydraulic

Porcelain electrical supplies
 Ready mixed concrete
 Asbestos products
 Gaskets, packing and sealing devices
 Mineral wool
 Nonclay refractories

Primary Metal Industries

Blast furnaces (including coke ovens) steel works, and rolling mills
 Steel wire drawing and steel nails and spikes
 Cold rolled steel sheet, strip and bars
 Gray iron foundries
 Primary smelting and refining of copper
 Primary smelting and refining of zinc
 Primary production of aluminum
 Primary smelting and refining of nonferrous metals
 Secondary smelting and refining of nonferrous metals
 Rolling, drawing, and extruding of copper
 Rolling, drawing, and extruding of aluminum
 Aluminum extruded products
 Aluminum rolling and drawing
 Drawing and insulating of nonferrous wire
 Brass bronze, copper, and copper base alloy foundries (castings)
 Iron and steel forgings
 Primary metal products

Fabricated Metal Products, except Machinery and Transportation Equipment

metal cans
 Cutlery
 Hand and edge tools, except machine tools and hand saws
 hardware

Heating equipment, except electric and warm air furnaces
 Fabricated structural metal
 Metal doors, sash frames, molding and trim
 Fabricated plate work (boiler shops)
 Sheet metal work
 Screw machine products
 Bolts, nuts, screws, rivets, and washers
 Metal stampings
 Iron and steel forgings
 Safes and vaults
 Valves and pipe fittings, except plumbers' brass goods
 Fabricated pipe and fabricated pipe fittings

Machinery, except Electrical

Internal combustion engines
 Construction machinery and equipment
 Mining machinery and equipment, except oil field machinery and equipment
 Oil field machinery and equipment
 Elevators and moving stairways
 Hoists, industrial cranes, and monorail systems
 Industrial trucks, tractors, trailers, and rackers
 Machine tools, metal cutting types
 Metalworking machinery
 Special industry machinery
 Pumps and pumping equipment
 Blowers and exhaust and ventilation fans
 Speed changers, industrial high speed drives and gears
 Mechanical power transmission equipment
 Office machines
 Air conditioning and warm air heating equipment and commercial and industrial refrigeration equipment

Service industry machines
 Carburetors, pistons, piston rings and valves
 Machinery, except electrical

Electrical and Electronic Machinery, Equipment and Supplies

Electric measuring instruments and test equipment
 Power, distribution, and specialty transformers
 Switchgear and switchboard apparatus
 Motor and generators
 Industrial controls
 Welding apparatus, electric
 Carbon and graphite products
 Household refrigerators and home and farm freezers
 Household laundry equipment
 Electric housewares and fans
 Lighting fixtures
 Current carrying wiring devices
 Noncurrent carrying wiring devices
 Phonograph records and pre-recorded magnetic tape
 Radio and television transmitting, signaling and detection equipment and apparatus
 Semiconductors and related devices

Transportation Equipment

Truck trailers

Measuring, Analyzing and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks

Engineering, laboratory, scientific and research instruments and associated equipment
 Automatic controls for regulating residential and commercial environments and appliances

Measuring, Analyzing and Controlling Instruments; Photographic, Medical and Optical Goods; Watches and Clocks (cont.)

Industrial instruments for measurement, display and control of process variables; and related products
Surgical and medical instruments and apparatus
Orthopedic, prosthetic and surgical appliances and supplies
Photographic equipment and supplies

Paper and Allied Products

Pulp mills
Paper mills, except building paper mills
Paperboard mills
Paper coating and glazing
Envelopes
Sanitary paper products
Corrugated and solid fiber boxes
Sanitary food containers
Fiber cans, tubes, drums, and similar products
Building paper and building board mills

Printing, Publishing, and Allied Industries

Newspapers: publishing, publishing and printing
Periodicals: publishing, publishing and printing
Books: publishing, publishing and printing
Book printing
Miscellaneous publishing
Commercial printing, letterpress, and screen
Commercial printing, lithographic
Manifold business forms
Greeting card publishing
Blankbooks, loose leaf binders and devices

Miscellaneous Manufacturing Industries

Games and toys
Games, toys and children's vehicles; except dolls and bicycles
Sporting and athletic goods

All companies were asked to specifically state how the elimination of controls would solve their shortage problems. The answers were obviously many and varied. However, a majority consensus established three separate points: 1) the removal of controls would provide a direct economic incentive to increase production not now found under controls. A great many companies stated that prompt decontrol would stimulate capital investment and expansion. (See "Capital Expansion" section of this paper.) 2) the elimination of controls would go a long way to forestall the overseas shipment of critical commodities thereby increasing domestic supply. Such decontrol would also again provide the ability to attract important foreign goods needed for domestic production back into the U.S. market. 3) the elimination of controls would help to dampen demand by allocating scarce commodities with increased prices.

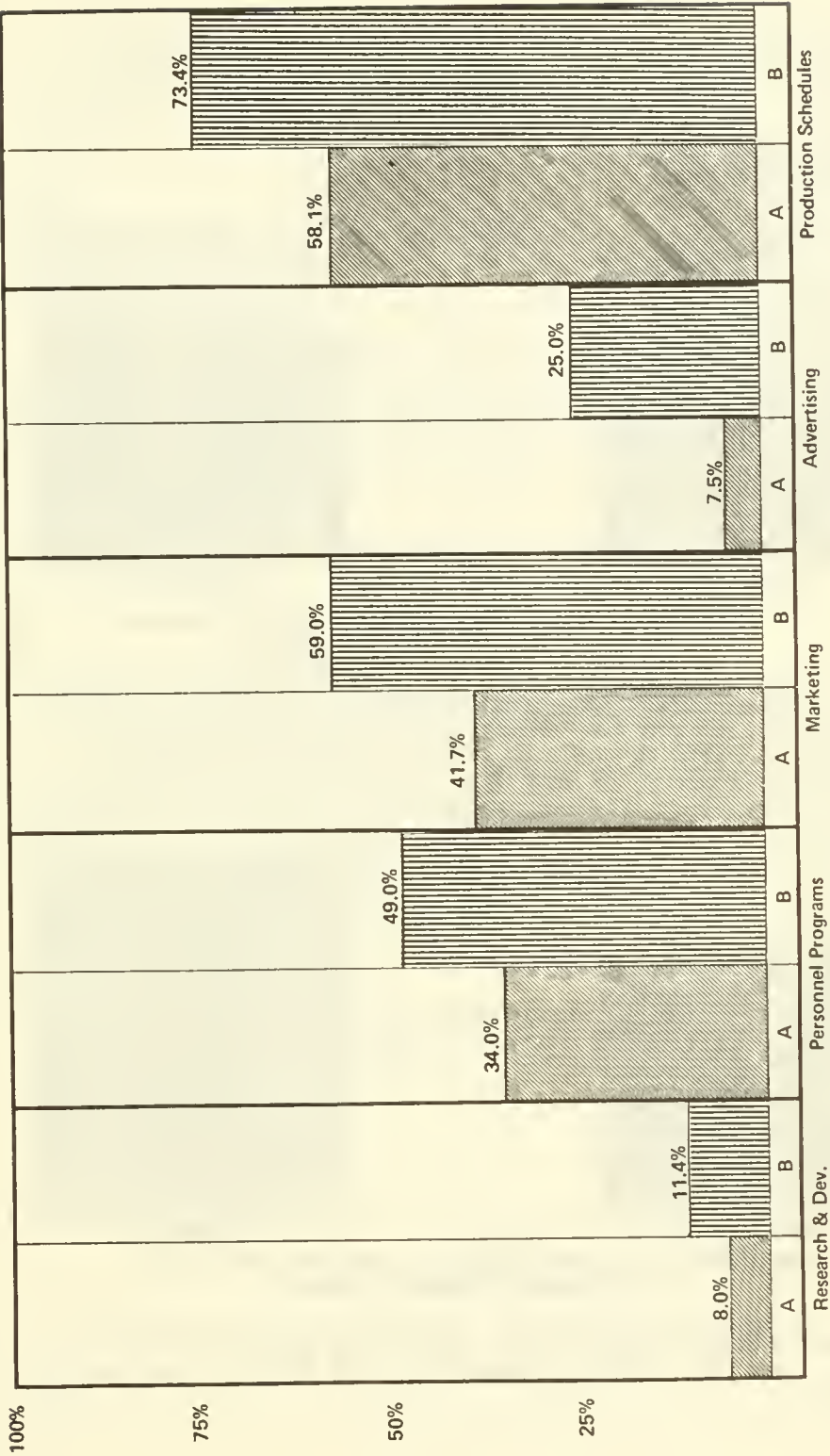
Most all of the firms argued that the interference with traditional supply-demand market function has been the number one cause of shortages, and that an elimination of controls would rather promptly correct the situation.

BUSINESS PRACTICES

Since the imposition of controls, many companies had complained, particularly during Phase IV, that the requirements of the regulations made it necessary for them to take a variety of special internal actions to comply with the guidelines. Companies said that these adjustments in normal business practices were unnecessarily time consuming at best. Alterations in production schedules, for example, frequently translated into higher per unit costs. A firm that recognizes that the sale of too many products may put them in violation of profit margin rules, may elect to cut back on advertising. The controls inspired elimination of certain products from company lines may force adjustments in well laid marketing plans. The list goes on and on. . .

In order to make a determination on the extent to which firms had been damaged by virtue of uneconomical or unfavorable adjustments in customary business practices because of controls, the following question was asked: "Have your company's normal business practices in the following areas (research, personnel program, marketing, advertising, production, and other) been affected adversely as a result of controls?" Each firm was able to respond individually to each business practice and space was also provided to list any other area outside from the ones we named. The results are graphically displayed on the following page.

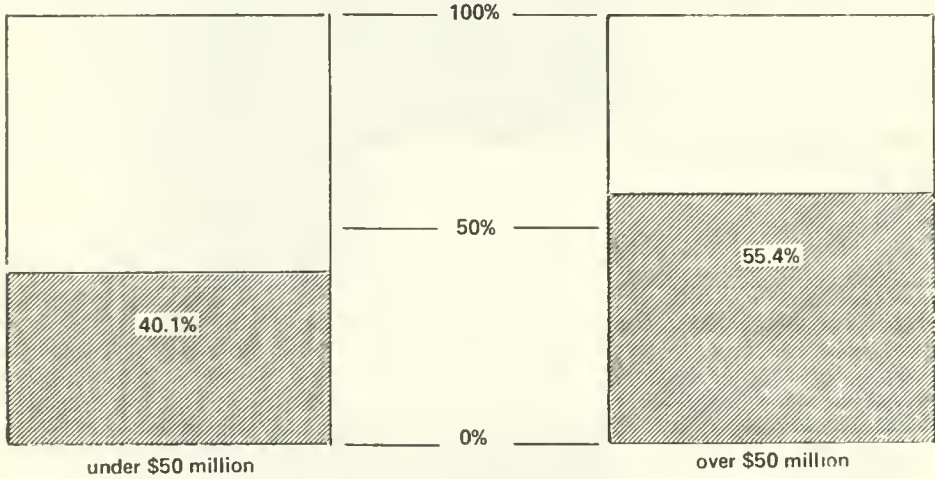
It is appropriate to point out that a larger than average per cent did not answer this multiple question. The "no responses" were factored out of the graph.



A - Firms Under \$50 Million Revenues
B - Firms Over \$50 Million Revenues

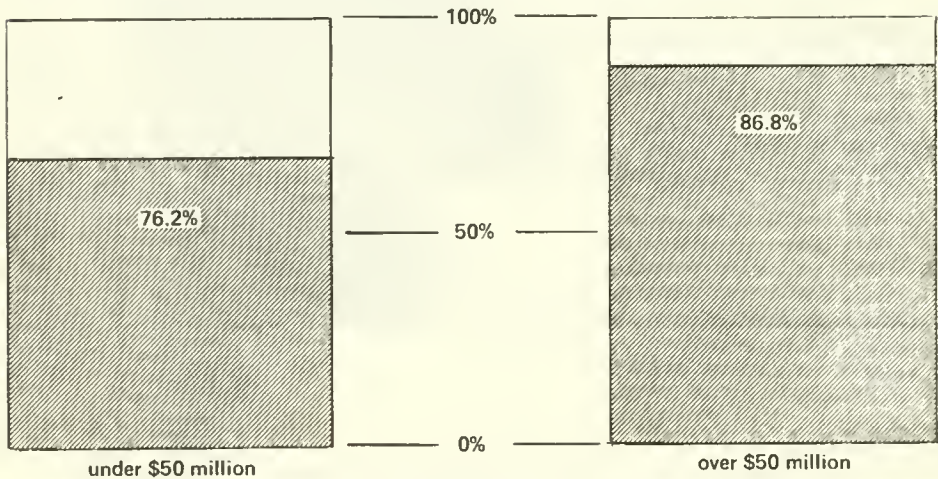
FIRMS HAVING ADVERSE EFFECTS IN NORMAL BUSINESS PRACTICES AS A RESULT OF CONTROLS.

As can be plainly observed, the larger firms, i.e., those whose revenues exceed \$50 million per year average half again as many companies reporting adverse effects as did the smaller ones. This is probably to be expected. The great majority of firms providing information in the "other category of business practices most frequently mentioned adverse effects in the areas of accounting and pricing.



**FIRMS FORCED TO MODIFY PRODUCTION AND MARKETING PLANS
AT THE EXPENSE OF SERVING CUSTOMERS
BECAUSE OF WAGE AND PRICE CONTROLS**

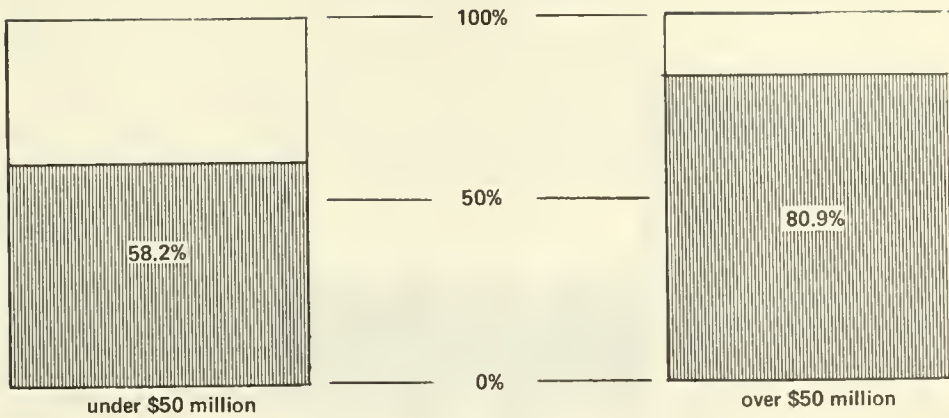
All companies were asked: "In light of Cost of Living Council restraints, has your firm been forced to modify its production and marketing plans at the expense of serving its customer?" Over 40% of the small companies and about 55% of the large companies said "yes".



**FIRMS ASSERTING THAT CONSUMERS WILL PAY MORE FOR PRODUCTS
THEY PURCHASE BECAUSE OF CONTROLS**

All companies were also asked: "Do you feel that, in the long run, consumers will end up paying more for products they purchase because of controls?" Over 76% of the small companies and almost 87% of the large companies said "yes".

CORPORATE EARNINGS



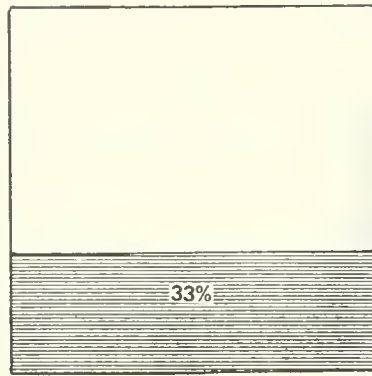
FIRMS HAVING ADVERSE EFFECTS ON EARNINGS DUE TO CONTROLS

Despite claims by some that corporations have prospered in an era of controls, a substantial majority, three out of five small firms and four out of five large firms, say that controls adversely affected corporate earnings.

There have been allegations that the past year has been a period of profit bonanza for American corporations. These are based on comparison with profits in the depressed period of a few years ago, and on statistics which include in profits an unreal element due solely to inflation. In any case, these figures refute the contention that price controls have benefited corporate earnings. That the effect has been damaging is easily demonstrable. With the exception of the loss and low profit firms and those firms who have not raised the price of a single item, all firms are prohibited from increasing their corporate profit margin any higher than it was for an average of two of the last five years, which as mentioned above was a depressed period.

Clearly, the area of corporate earnings has been a disappointment to many firms that had expected to do better, and would have, had it not been for wage and price controls. The greatest long-term damage has already been done to cyclical industries.

CAPITAL EXPENDITURES



ALL FIRMS

FIRMS POSTPONING OR CANCELLING PLANNED INCREASES
IN CAPITAL OUTLAYS DUE TO CONTROLS.

As indicated, one effect of controls is to reduce the expenditures of business firms for new plant and equipment. This can be a serious restraint on economic growth which depends heavily on the expansion of productive capacity.

A firm may choose for any number of reasons to cancel planned increases in capital expenditures. They may do so because of expected shortages, unfavorable earnings, decreasing demand, high interest rates and many other reasons. But it is striking that many firms would cancel such plans in a period of high demand because of the imposition of a "temporary" government program. Nevertheless, one in three firms surveyed say that their firm has made such decisions because of the direct or indirect influence of controls. This is a gigantic figure in its correct perspective. Businessmen are clearly concerned about the survival of their firms in a time of government controls.

Approximately 25% of the firms responding to this question said the cancellation of capital expenditures represents a "significant" reduction from total planned capital spending. 65% of the firms judged the controls-inspired cut-back "moderate" while only about 10% said they were insignificant.

While we had anticipated that a number of firms would indicate reductions in capital spending due to the adverse influence of controls, we were surprised that it was that high and that significant. All firms were also asked: "How would the removal of controls affect decisions on capital spending?"

After factoring out the 16% of firms not responding to the question, 66.2% or 2 out of 3 firms said that the removal of controls "would tend to encourage increased capital spending." 33.8% said that "the removal of controls would not affect current plans." Although space was provided for firms to check a box saying that the removal of controls "would tend to discourage increased capital spending", not a single firm indicated this to be the case.

Earlier in this paper, we stated that half of all production interruptions and curtailments were attributable to an unavailability of materials required by firms to produce or provide their products or perform their services. In another part of this paper, we discussed the fact that insufficient domestic production was listed as the second most significant cause of shortages with over 72% of small firms and almost 57% of large firms listing it as an important contributing factor to shortages.

If we can accept the simple premise that there is an obvious and direct relationship between increased capital spending and the ability of a firm to provide more products and materials to its customers, the not too startling conclusion we reach with the presentation of the data on capital spending is that a removal of controls will help the situation tremendously. Because the Cost of Living Council ties promises of production expansion to decontrol, this data would seem to demonstrate clearly that the faster total decontrol is accomplished, the faster the realization of increased production will find its fruition. Of course, it also follows that the longer decontrol is delayed, the more severe will the problem become and the harder and longer the task will be to overcome the problems controls mistakenly seek to cure.

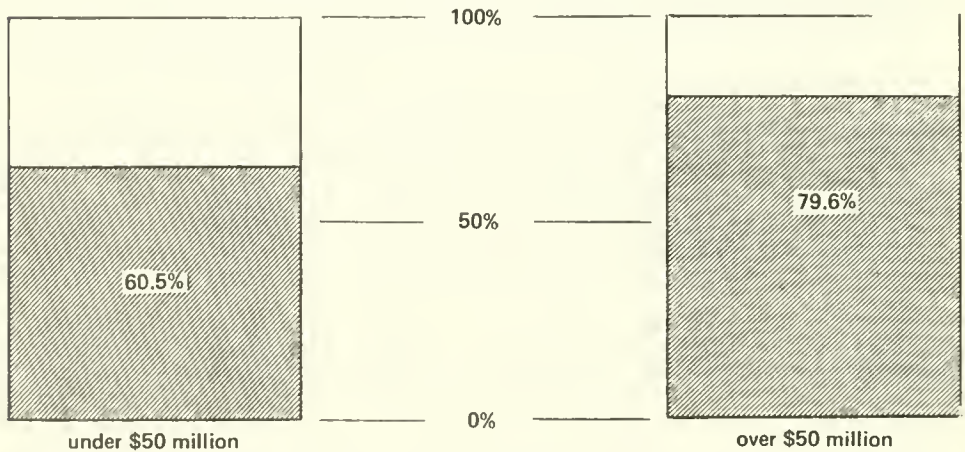
COST OF CONTROLS

All companies responding to the survey were asked to estimate the approximate total annual administrative cost of compliance with the stabilization program including cost of work by employees of the firm, the cost of full and part time work, outside lawyers and consultants, business trips, etc.; but not counting lost revenues, penalties, foregone earning, etc. In answering this difficult question many firms gave us a number with a "plus" (+) sign after it indicating "in excess of" a figure named. In constructing an average we eliminated the "in excess of" indications.

Based on answers from 125 companies whose total annual revenues were under \$50 million, the average annual administrative cost of compliance was estimated to be \$26,854. The range was from as low as zero for one firm to as high as \$150,000 for another. It should be remembered when understanding this data that firms with less than \$50 million generally have no prenotification or reporting responsibilities and no forms to submit.

Based on answers from 189 companies whose total annual revenues exceed \$50 million, the average annual administrative cost of compliance was estimated to be \$174,876. The range varied from the low of \$3,000 to a high of \$6,000,000. Five firms estimated compliance costs at or in excess of \$1,000,000.

All firms were asked whether "wage and price controls have caused harmful distortions or financial damage to (their) firm or industry." Three out of five small firms and four out of five large firms said controls had been responsible for such damage and distortions.



FIRMS SUFFERING HARMFUL DISTORTIONS OR FINANCIAL DAMAGE BECAUSE OF CONTROLS.

Firms indicating an affirmative answer to that question were asked to explain specifically how controls caused harm to their companies.

All firms indicating that wage and price controls had considerably harmful distortions or financial damage were asked to specifically describe how this damage came about. The answers were many and varied. We shall briefly highlight some of the major examples of how damage has been done below:

- significant commitment of management and staff time to monitor activities and prepare reports
- severely hampered marketing flexibility
- adjustments in production schedules which delayed shipment
- extensive administrative costs
- necessity to centralize all pricing decisions
- considerable confusion in understanding the regulations
- lost sales and revenues
- reduction of profitability
- shortages
- inability to recover cost increases
- higher production costs
- interference with employee compensation causing dissatisfaction
- shortages requiring a premium payment for goods or substitution of higher cost materials
- production slow downs because of shortages resulting in lost sales
- adverse economic effects related to decrease in capital spending
- weakened customer relations resulting from allocations of finished products
- restricted profit return for cyclical industries
- diverted employee attention from corporate goals
- employee compensation restricted due to inability to compensate on basis of merit
- inability to attract foreign goods due to low prices

- inability to recover costs during depressed market conditions
- short-run planning has become virtually impossible
- adverse effects on revenues
- adverse effects on profits and earnings
- adverse effects on profit margins
- market dislocations
- inability of regulations to apply to the manufacturer of a large number of items sold in competitive and complex industrial markets

To provide an opportunity for more positive responses, all companies were asked: "Do you feel that controls have had any beneficial effects on the conduct of your business?" 84% of all firms polled said "no", while only about 16% replied that there had been some beneficial effect of controls. The firms answering "yes" were asked to list any areas where controls may have benefitted their firm. The answers generally covered two areas; 1) temporary lower labor and material costs and 2) greater detailed analysis of costs. About 7% of the firms polled (or just under half of those answering "yes") said that they believed there to be some short-range benefit to their firm because wages were less than they might have been without controls. These companies also believed that there had been benefits because some materials they purchase were probably cheaper with controls.

Another 8% of the firms (or half of those claiming some beneficial effects from controls) said that the imposition of these controls had helped them focus ~~in~~ on unprofitable product lines. Others said that because of the influence of price controls improved cost analysis techniques were developed. Management, it was said, placed a greater degree of emphasis on and interest in pricing and cost interpretation.

Nevertheless, seven out of eight firms said there had been no beneficial effects of controls and their attitude was summed up by the comment of one corporate comptroller who said, "If I sat here and thought all week, I could not possibly come up with even a single favorable comment about controls."

EMPLOYMENT

It was the general purpose of this study to concentrate more on the price side of the wage/price equation. However, we were anxious to see if the controls affected employment in our sample's firms, and if so, what kinds of effects there were. We will not deal here with unemployment as this information is available in other places.

In the "Business Practices" section of this paper we reported that 39% of the small firms and 49% of the large firms indicated adverse effects as a result of control in corporate personnel programs. As some of these adverse effects were mentioned earlier, we will not expand on them now.

We did discover, however, that 23.7% of the small companies and 41.2% of the large companies reported that controls had had an effect upon the number of persons employed by the companies. Many companies reported that they would have employed more persons, had it not been for controls. The relationship here is one of increased production and planned capital spending. Had both areas not been cut back due to controls, it is assumed that the unemployment rate may have been slightly lower. We do not have enough information to determine the precise impact, however, so this remains merely an educated assumption.

Many companies reported that the wage controls encouraged unionization. The labor force, they argued, observed that the unions were frequently allowed to settle contracts for an amount generally in excess of the 5.5% guidelines, while the non-unionized shops did not fare as well. Obviously, from the view of the worker, this constituted a very real motivation to unionize in hopes of gaining approval for wage adjustments in excess of the standard.

Another important constant complaint by firms was their inability to keep high quality personnel. About 6% of all firms reported having a serious problem keeping people. These companies said that an abnormal number of employees were hired away because the firm could not legally increase their compensation. Another 25% of small firms and 33.6% of large firms said that they were experiencing the same problem, but declined to categorize it as serious. The problems became a bit more serious after the Cost of Living Council issued its new regulations on executive and variable compensation, a move that was greeted by overwhelming opposition throughout the business community.

All firms were asked: "Do you feel that the current wage regulations affect productivity?" Less than 1% of the companies polled said that the wage regulations "encourage increased productivity." About 40% of the companies stated that the pay regulations "discourage increased productivity." The remainder of the firms were "uncertain."

This would appear to be another example of where controls work against themselves.

GENERAL BUSINESS ATTITUDES AND OPINIONS

For the past several years businessmen have felt that the imposition of controls have done great harm to the image of business by highlighting various government actions. There is the story, for example, of the Tier I Wisconsin Company which received a price reduction order from the Price Commission after an unintended violation of the profit margin rule. The company was chastized in papers throughout the nation. Its stock fell off in value over \$12 million in two days. With all the excitement, the Government had not mentioned that the amount of the illegal coverage was less than the poultry sum of \$700, or about 1/1000th of 1% of the firm's annual sales. Yet, in the mind of the average man on the street, this was just another example of the vicious corporation gouging the public. Frequently, the Cost of Living Council calls companies in to justify why they should be allowed a price increase - to be more specific, a dollar for dollar with no profit pass-through of a portion (not all) of costs after deduction for productivity. These actions have been constantly interpreted as an indictment of those firms by the public.

All companies were asked: "Do you feel that the current (wage and price control) regulations are 1) equitable; and 2) equitably enforced?" After factoring out a 9% no response, only 22.1% of the small firms and a miniscule 7.9% of the large firms agreed that the regulations were equitable. 92.1% of large companies and 77.9% of small companies said they were not equitable. The Government's performance was only slightly better on the second point. About 22% of all firms responding to the question believed the regulations to be equitably enforced and an overwhelming 78% were not convinced controls were even enforced equitably.

One might think there to be some redeeming feature in all of this if the program had been successful in meeting its primary goal of reducing inflation. The CPI would suggest that not to be the case. After Phase II there was disagreement on the success of the program. At the request of the Government we put the following question to all firms: "Do you feel that controls themselves have reduced the level of inflation below what it would have been without controls?" The responses are listed below:

Yes - - - 14.7%

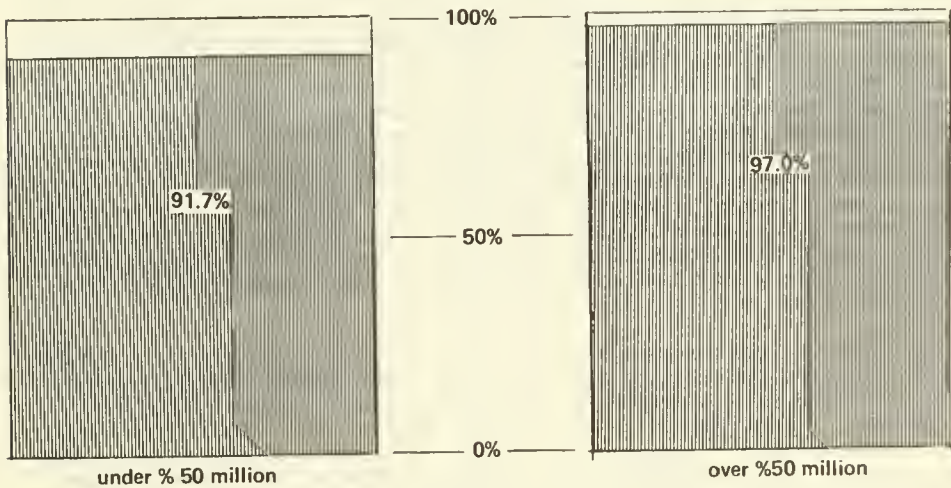
No - - - 51.7%

Uncertain - 33.6%

With only one in seven companies believing that controls had accomplished a portion of their primary goal, it becomes even more difficult to understand the economic rationale for controls. Six out of seven companies, as we had reported earlier, said that, in the long run, consumers will pay more for the products they purchase because of controls. Controls then have not only failed to work, they have further aggravated the problem.

All companies were asked: "Do you feel that the current regulations on wage and price controls are generally clear and understandable?" Four out of five firms (80.6%) said "no" while only one in five agreed with a "yes" answer.

Finally, we asked all firms: "Do you favor a prompt termination of controls?" The response was even greater than we might have expected as demonstrated on the following chart. Ninety-seven percent of large companies and almost 92% of small companies favored a prompt termination of controls. A close examination of the firms not favoring prompt dismantling of controls revealed that a majority either had fewer than 60 employees or were public utilities. Both are all ready exempted from control.



PERCENT OF FIRMS FAVORING A PROMPT TERMINATION OF CONTROLS

CONCLUSION

In this study we have attempted to demonstrate statistically the extent to which wage and price controls have had an effect on business in a large number of important areas. We have concluded that there has hardly been an important area of business policies and practices that has emerged unscathed. Controls have shown themselves in practice even more damaging and disruptive than the committed pessimist might have imagined.

The future of the domestic economical stability of the United States rests, in great part, upon the shoulders of industry. Wage and price controls have succeeded in eroding the sound foundation on which the world's strongest economy rests. They have, by their very nature, interfered with the market system in almost every imaginable way to the detriment of producers and consumers alike. As Dr. C. Jackson Grayson, Jr., the former Chairman of the Price Commission, argued in a recent article in the Harvard Business Review, "The free market system is in danger of collapse under central economic controls; we must put the brakes on now." Grayson views the trend with alarm and suggests that unless we return promptly to a market system "conceived on the concepts of competition, monetary reward, excellence, and change" we will "have helped build our own cages" of a society with limited personal and economic freedoms. Capitalism, as Karl Marx predicted, will have destroyed itself.

The power of the government in this time of controls is gigantic. Senator William Proxmire, the rotating chairman of the Joint Economic Committee, and himself regarded to be a proponent of controls, said in a recent issue of Congressional Quarterly when referring to the congressional authority to allow for an administration of controls: "What we did -- and I thought it was a very stupid action -- as a political ploy we gave the Administration enormous power." On February 19, 1971, in testimony on the Economic Stabilization Act before the Congress, Federal Reserve Board Chairman Arthur Burns said: "You are giving too much power to the President under this legislation. You are giving the President virtually dictatorial power. Do you really want to give any man that much power?" And so it is the case today as the Cost of Living Council holds the very life and death of every business enterprise in its grip.

While there may be an understandable tendency to blame the Cost of Living Council for all the ills suffered under controls, that is not completely fair. Certainly they would have done a much better job in avoiding the pitfalls by giving greater credence to the seasoned judgments by industry experts. But, beyond a very short-run situation, measured in months and not in years, controls were doomed to fail. As one pro-controls Congressman aptly put it, "We end up where we started, only worse." By the admission of CLC's own General Counsel in congressional testimony last October, "controls are necessarily disruptive."

Our conclusion, then, is a very simple one: Controls have caused tremendous disruptions and dislocations; controls have not only failed to contain inflation, they have helped to fuel its fires.

Our recommendation is equally simple: Eliminate all wage and price controls immediately and let this experience have taught us a valuable lesson so that we may never again go down this reckless road.

SYNOPSIS

In the first section of this study we said that a copy of the questionnaire sent to 2300 firms would appear in this synopsis.

An exact duplication appears on the next four pages. We have filled in the blank spaces on the form with the percent figures obtained from large (i.e. over \$50 million in total annual revenues) and small (i.e. under \$50 million in total annual revenues) firms. Spaces provided for respondents to describe a particular situation or effect of controls are not filled in on the questionnaire, as the answers are described in the text of this study.

NATIONAL ASSOCIATION OF MANUFACTURERS

WAGE AND PRICE CONTROLS QUESTIONNAIRE

INSTRUCTIONS: Will you please check the correct box or fill in the appropriate blank. While not all questions will be applicable to your firm's situations, please answer all questions to the best of your ability. This questionnaire will be used for statistical purposes only, and all information contained herein will be treated as confidential. Neither the identity of, nor the information supplied by any company, will be made known to any other company or the Cost of Living Council or other government agency. This form should be completed as soon as possible. Those firms identifying themselves below will receive a complete statistical tabulation of the findings. All replies must be received by December 7, 1973. Please return all questionnaires to: Mr. Jeffrey P. Eves, Director, Economic Stabilization, National Association of Manufacturers, 1776 F Street, NW, Washington, DC 20006. A pre-addressed envelope is enclosed for your convenience.

(Optional) COMPANY NAME ALL COMPANIES
 (Optional) CONTACT _____
 (Optional) ADDRESS _____
 (Optional) PHONE _____

TOTAL ANNUAL REVENUES
 (Most Recent Fiscal Year)

NUMBER OF EMPLOYEES

15.7 \$500 Million and Up
25.2 \$100 Million - \$500 Million
14.1 \$ 50 Million - \$100 Million
44.0 Below \$50 Million

19.5 10,000 and Up
24.4 2,500 - 10,000
52.5 60 - 2,500
36.0 Below 60

INDUSTRY (Type of Business) _____

LIST YOUR FIRM'S MAJOR 4 DIGIT SIC CODES _____

TOTAL NUMBER OF PRODUCT LINES (4-Digit SIC Codes) _____

1. PRODUCTION INTERRUPTIONS OR CURTAILMENTS

Has your firm eliminated or reduced its output of any products or services as a direct or indirect result of wage and price controls?

Large: 45.7 Yes 54.3 No Small: 30.9 Yes 69.1 No

- a. If you have answered "yes" to the above, again, as a direct or indirect result of wage and price controls, do you attribute such production interruptions or curtailments specifically to:

49.7 Unavailability of raw materials

44.3 Uneconomical production (economic return does not justify production activity)

6.0 Other: Specify _____

- b. If you have answered "yes" to No. 1, list those products or services:

Product	4 Digit SIC Codes	Were other lines expanded to compensate?			
<u>Various</u>	<u>Large Firms</u>	<u>8.8</u> Yes	<u>33.1</u> Partially	<u>58.1</u> No	
	<u>Small Firms</u>	<u>2.7</u> Yes	<u>25.3</u> Partially	<u>72.0</u> No	
		Yes	Partially	No	
		Yes	Partially	No	
		Yes	Partially	No	

c. Were those products listed above a significant factor in total sales?

22% Very Significant
37% Moderately Significant
27% Marginally Significant
14% Insignificant

2. SHORTAGES

Has your company experienced difficulty in obtaining its requirements of any important materials or supplies?

Large: 97.0 Yes 3.0 No Small: 89.1 Yes 10.9 No

a. What are the principle influencing factors that you attribute shortages in your firm to: (Rank the top three, if any, in order of importance)

Large

80.5

56.3

56.7

41.9

36.3

6.6

7.4

4.2

Small
61.8 Wage and Price Controls, themselves
46.7 International price differentials
72.3 Insufficient domestic production unrelated to the Stabilization Program
35.5 Energy shortages unrelated to Stabilization Program
32.9 Shortages caused by EPA (Environmental Protection Agency) requirements
6.0 Insufficient foreign production
2.0 Other government programs and requirements
Specify: _____
2.0 Other
Specify: _____

b. If you are experiencing shortages due to wage-price controls, list the materials and the SIC Code of the product in which they are used: (Please Check)

Materials or Supplies	4 Digit SIC Code of Major Finished Product(s)	Degree of Difficulty in Obtaining		
		Critical	Significant	Moderate
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

c. If substitute products were used because of wage-price controls, what effect did their use have on product line costs?

Large

22.1

58.9

15.8

3.2

Small
25.0 Serious adverse effect
51.6 Moderate adverse effect
17.2 Minor adverse effect
6.2 No adverse effects

d. Assuming controls continue, what do you believe will be their effect on the shortage problem in your firm over the next 6 months?

Next 6 Months

Large

32.8

52.3

14.5

.4

Small
25.7 It will become critical
51.6 It will become worse
17.2 It will remain about the same
6.2 It will improve

e. Assuming controls were promptly ended, what do you believe the effect in the shortage problem would be within the next 6 to 12 months?

Small

Large

0

3.9

12.1

58.4

25.6

1.8 It will become critical
3.0 It will become worse
27.2 It will remain about the same
48.5 It will slightly improve
19.5 It will greatly improve

- f. As specifically as possible, state how the elimination of controls will solve your shortage problem: _____

3. BUSINESS PRACTICES

Have your company's normal business practices in the following areas been affected adversely as a result of controls?

	Large		Small	
a. Research	11.4 Yes	88.6 No	8.0 Yes	92.0 No
b. Personnel Programs	49.0 Yes	51.0 No	34.0 Yes	66.0 No
c. Marketing	59.0 Yes	41.0 No	41.7 Yes	58.3 No
d. Advertising	25.0 Yes	75.0 No	7.5 Yes	92.5 No
e. Production Schedules	73.4 Yes	26.6 No	58.1 Yes	41.9 No
f. Other,	___ Yes	___ No		

Specify: _____

- g. As specifically as possible, describe how the controls program has interfered with normal business practices: _____

4. CORPORATE EARNINGS

Have controls adversely affected the earnings of your firm?

Large 80.9 Yes 19.1 No Small 58.2 Yes 41.8 No

5. CAPITAL EXPENDITURES

Has your firm postponed or cancelled planned increases in capital expenditures because of the direct or indirect influence of controls?

33.0 Yes 66.0 No

- a. If you have answered "yes" to the above, what reduction or delay does this represent as compared to total planned capital spending?

26.0 Significant 64.0 Moderate 10.0 Insignificant

- b. How would the removal of controls affect decisions on capital spending?

33.8 The removal of controls would not affect current plans

66.2 It would tend to encourage increased capital spending

0 It would tend to discourage increased capital spending

6. EMPLOYMENT

Have controls affected employment in your firm?

Large 41.2 Yes ___ No Small 23.7 Yes ___ No

- a. Have you had an above normal number of your employees hired away from you because you could not legally increase their compensation?

Large	6.4 Yes, it has been a serious problem	Small	7.4
	32.6 Yes, it has been a minor problem		25.6
	60.0 No		67.0

- b. Do you feel that the current wage regulations affect productivity?

.4 Encourage increased productivity

39.7 Discourage increased productivity

59.9 Uncertain

7. COST OF CONTROLS

Do you feel that wage and price controls have caused harmful distortions or financial damage to your firm or industry?

Large 79.6 Yes 20.4 No Small 60.5 Yes 39.5 No

a. Estimate the approximate total annual administrative cost of compliance: (including overhead, cost of employee work full and part time, outside lawyers or consultants, business trips, etc.) \$Large \$174,876 Small \$26,854

b. As specifically as possible, describe how controls have caused harm to your firm:

8. GENERAL

Do you favor a prompt termination of controls?

Large 97.0 Yes 3.0 No Small 91.7 Yes 8.3 No

a. Do you feel that the current regulations on wage and price controls are generally clear and understandable?

19.2 Yes 80.8 No

b. Do you feel the current regulations are: 1) Equitable? Large 7.9 Yes 92.1 No 22.1 Y 77.9 N
2) Equitably enforced? 22.7 Yes 77.3 No 22.4 Y 77.6 N

c. Do you feel that controls are damaging the U.S. competitive position in world trade?

Large 45.8 Yes 13.4 No 40.8 Uncertain Small 43.1 Yes 18.5 No 38.4 Uncertain

d. Do you feel that, in the long run, consumers will end up paying more for products they purchase because of controls?

Large 86.8 Yes 13.2 No Small 76.2 Yes 23.8 No

e. In light of the Cost of Living Council restraints, has your firm been forced to modify its production and marketing plans at the expense of serving its customers?

Large 55.4 Yes 44.6 No Small 40.1 Yes 59.9 No

f. Do you feel that the controls themselves have reduced the level of inflations below what it would have been without controls?

14.7 Yes 51.7 No 33.6 Uncertain

g. If controls were ended promptly, what would be the effect of your overall product price level over the next 6 months (on an annual rate basis) as compared to your firm's average price performance during the last two years?

2.6 Sharply higher 33.9 About the same 4.6 Uncertain
55.4 Moderately higher 3.5 Lower

h. Do you feel that controls have had any beneficial effect on the conduct of your business?

84.0 Yes 16.0 No

i. As specifically as possible, list areas where controls may have benefitted your firm:



NATIONAL ASSOCIATION OF MANUFACTURERS
1776 F Street, Northwest, Washington, D.C. 20006

TAX ANALYSTS AND ADVOCATES, THOMAS F. FIELD

v.

INTERNAL REVENUE SERVICE, ET AL.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 841-72

OPINION

This is an action under the Freedom of Information Act, 5 U.S.C. § 552, presently before the Court on cross-motions for Summary Judgment. Plaintiffs seek to compel public disclosure by the Internal Revenue Service (IRS) of certain letter rulings, technical advice memoranda, and communications and indices relating thereto. Specifically, Plaintiffs seek to inspect and copy unpublished letter rulings, issued to producers of minerals other than oil and gas between July 26, 1968, and October 1, 1971, in which determinations were made of the processes to be treated as "mining" under Section 613(c) of the Internal Revenue Code, 26 U.S.C. § 613(c), when computing gross income from property for percentage depletion purposes. Plaintiffs also seek those portions of technical advice memoranda on this subject issued to taxpayers during the same period and so much of the IRS letter ruling index system as is needed to ascertain whether additional unpublished rulings in point exist.¹ Lastly, Plaintiffs seek disclosure of all communications to and from the IRS with regard to said rulings and memoranda from outside the Executive Branch of the United States Government. There is no dispute that Plaintiffs request for the records complied with applicable regulations² and that Plaintiffs have exhausted their administrative remedies. The parties have engaged in extensive discovery and there is now no genuine dispute as to any material issue of fact.

Under the Freedom of Information Act the burden is on the agency to sustain its claim that disclosure is not required.³ Defendants' legal contentions are, first, that the Freedom of Information Act does not apply to letter rulings or technical advice memoranda and, secondly, that even if the Act applies, specific exemptions preclude disclosure of the materials here sought.

A letter ruling is a written statement issued to a taxpayer by the Office of Assistant Commissioner (Technical) in which interpretations of the tax laws are made and applied to a specific set of facts.⁴ The function of a letter ruling, usually sought by the taxpayer in advance of contemplated transaction, is to advise the taxpayer regarding the tax treatment that he can expect from IRS in the circumstances specified in the ruling. The letter rulings are not publicly disclosed by the IRS and it is clearly specified that no taxpayer is entitled to rely upon an unpublished private ruling not issued specifically to him.⁵ The taxpayer who does receive such a ruling is advised to file it along with his tax return.⁶

A technical advice memoranda (T.A. memo) is comparable to a letter ruling, except that it is not issued directly to a taxpayer, but to a District Director of the IRS in response to the director's request for instructions as to the treatment of a specific set of facts relating to a named taxpayer.⁷ The director's question may relate to audit examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit.⁸ The substantive portion of the memorandum is given to the taxpayer.⁹

All letter rulings and technical advice memoranda are divided into two categories by the IRS for filing purposes. Many rulings and memos are considered of no significant "reference" value. These are placed in a historical file, alphabetically by taxpayer's name, and maintained for a period of four years. No separate index is prepared for materials in the historical file.¹⁰ The other letter rulings and t.a. memos are deemed to have a continuing "reference" value for internal IRS purposes, and these are placed in the IRS' permanent reference file, along with Court decisions, published Revenue Rulings,¹¹ and other materials deemed to have a continuing reference value. The reference file is organized by code section and an "index-digest" card file is maintained, giving citations to the main "reference" file and usually summarizing the contents of the reference file.¹²

Footnotes at end of article.

Defendants have indicated that there are two unpublished letter rulings, eight technical advice memoranda and six index-digest cards within the category of information sought by Plaintiffs.¹³

The communications in question, relating to letter rulings and t.a. memos, consist of communications to and from the taxpayer or his representative.¹⁴ Letter rulings and t.a. memos are not to be confused with Revenue Rulings which are formal, published interpretations of the tax laws by the IRS,¹⁵ nor with Income Tax Regulations.¹⁶

I

A. Section (A)(2)(B) of the Freedom of Information Act, 5 U.S.C. § 552(A)(2)(B),¹⁷ expressly requires that all Federal agencies shall make available to the public "interpretations" adopted by the agency. Plaintiffs contend that letter rulings and technical advice memoranda (hereafter collectively referred to as letter rulings) are "interpretations . . . adopted by the agency" and therefore expressly required to be disclosed. As to such interpretations § 552(A)(2) further requires that a public and current index be maintained by the agency listing all interpretations adopted after July 4, 1967.¹⁸ Defendants agree that a letter ruling in fact "interprets and applies the tax laws to a specific set of facts."¹⁹ Despite this agreement the IRS contends that a letter ruling is not an interpretation adopted by the agency within the meaning of the statute. The IRS contends that "interpretation . . . adopted by the agency" means "precedent" and that since prior letter rulings are not cited or relied upon in the preparation of new agency determinations they are not "precedents."

The Court must first look to the language of the statute itself to resolve the controversy, for if the plain meaning of the statutory language is clear resort to secondary sources such as legislative history is inappropriate.²⁰ In the present case the Court finds the statute clear and controlling. Policy and interpretations adopted by the agency are to be disclosed. There is no basis in the statutory language to support Defendants' contention that this means only interpretations which will be cited and relied upon by the agency in the future. The statutory language is not so limited. All interpretations are to be disclosed. The Court finds no ambiguity in the words "adopted by the agency." The ordinary meaning of those words reaches any interpretation issued by the agency or its delegates acting within the scope of their authority. The Supreme Court has said specifically of the IRS' private letter rulings that "such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws."²¹

The fact that an interpretation has been once adopted by the agency does not necessarily mean that it thereby becomes binding "precedent." As an interpretation, it is entitled only to such future weight or authority as its rationale will bear, both within and without the agency.²² The agency's view might change quickly, in which case it would be free to revoke or disown the interpretation.²³ It matters not that the interpretation is never again cited or relied upon by the agency or anyone else, for this cannot obliterate the fact that the interpretation was once adopted by the agency and thereby came within the express terms of the Freedom of Information Act.

This approach is supported by the structure of the statute. § 552(a)(1)(D) requires publication in the Federal Register of all "statements of *general* policy or interpretations of *general applicability* formulated and adopted by the agency," while § 552(a)(2)(B) requires that the agency make available for public inspection and copying "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." Read together these provisions can only mean that interpretations of general applicability are to be published in the Federal Register while all other interpretations adopted by an agency, i.e. those *not* of general applicability, are to be made available to the public, albeit they need not be published. Thus, even those interpretations of very unique applicability must be made available under the Act.²⁴

Defendants rely for their interpretation of the statute equating "interpretation" with "precedent" upon language in the House Report on the Freedom of Information Act:

An agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such inter-

pretation is not cited or relied upon as a precedent in the disposition of other cases.

H. Rep. No. 1497, 89th Cong., 2d. Sess. (1966) at 7. This language would indeed seem to support Defendants position and it gives the Court some difficulty. Yet the House Report also states that "(t)he public has a need to know, for example, the details of an agency opinion on statement of policy on an income tax matter, . . ." H. Rept. at 8. This Court finds these statements somewhat contradictory.²⁵ When legislative history is contradictory or ambiguous it should not be allowed to outweigh the statutory language.²⁶ Further, the House Report is not the prime authority for interpretation of the Freedom of Information Act. The House Report "is characteristically broader and goes beyond the express terms of the statute. . . . The Senate Report is to be preferred over the House Report as a reliable indication of legislative intent . . ." *Getman v. N.L.R.B.*, 450 F. 2d 670, 673 n.8 (D.C. Cir. 1971).²⁷ The Senate Report follows the express language of the statute with little elaboration.²⁸ Defendants contend that the above quoted language in *Getman* has been overruled because the Supreme Court cited the House Report in *Environmental Protection Agency v. Mink*, ——— U.S. ———, 41 U.S.L.W. 4201 (No. 71-909, decided January 22, 1973), Slip Opinion at 9. The proposition for which the Supreme Court cited the House Report in *Mink*, however, was one on which the House Report was not at variance with the Senate Report nor with the plain meaning of the statute.²⁹ It is only where there is ambiguity or conflict between the two reports or between a Report and the statute that it becomes necessary to accept one over the other.³⁰ That situation was not before the Supreme Court in *Mink*.

The language and policy of the Freedom of Information Act require that the Court be hospitable to disclosure and that exemptions from the Acts' provisions be narrowly construed.³¹ The statutory language must be given primacy over the House Report.³² For these reasons the Court rejects Defendants' position and reliance on the House Report.

B. Accepting Defendants' reliance on the House Report for the moment, the Court finds that Plaintiffs would still prevail. There is no dispute that letter rulings are not cited by the IRS, in later rulings or elsewhere, as precedent. It is clear to the Court, however, that many of the rulings are in fact often "relied upon" by the agency as precedent and therefore come within the class of documents for which even the House Report requires disclosure. Defendants would resist that conclusion, but the undisputed facts on which it is based will be set forth. For the most part they are drawn from Defendants' description of the role of the letter rulings in IRS operations.

Most letter rulings and technical advice memoranda are maintained in a routine alphabetical file before (taxpayer's name and disposed of after four years.³³ Certain other letter rulings and technical advice memoranda are placed into another file that is arranged by Internal Revenue Code sections and is called the "reference" file.³⁴ Prior to 1967 that file was called the "precedent" file.³⁵

"A letter ruling or technical advice memorandum is placed in the 'reference' file rather than the 'routine' file if it . . . has future significant reference value because of the issues involved."³⁶

Classification as "reference" enables Internal Revenue Service personnel to refer to such rulings or technical advice memorandums in the future to find underlying authorities and reasoning when they are preparing an unpublished letter ruling or even a Revenue ruling to be published with a similar issue."³⁷

If the underlying authorities have not changed and the facts are the same or reasonably similar, a new ruling is bound to hold the same as the old "reference" ruling; common sense dictates that conclusion.³⁸

If someone does a good piece of research work and reaches a conclusion that is very well supported, that research is valuable as a reference or research tool . . . the goal is uniformity and correctness.³⁹

Presenting this description, Defendants conclude that letter rulings and technical advice memoranda are not "precedent" because only "the underlying principle of law is relied upon."⁴⁰ and "the rulings writer reaches his own independent conclusions."⁴¹

The Court has no desire to plunge into the semantic debate the parties have established for themselves as to what is or is not "precedent." Suffice to say that, again, the plain and established meaning of the word leads to the conclusion that in the operation pattern set forth above the IRS "re-

search tool" is in fact "precedent."⁴³ That a ruling is relied upon does not necessarily mean that it will be slavishly followed, for precedent is often only persuasive rather than controlling. Nor does reliance mean that the official decision maker is not free to reverse itself or overrule prior decisions if necessary. Just as within the Court system, the highest responsible authority within the agency is not bound to follow a "precedent" which on thorough examination he concludes is ill-founded or no longer appropriate.⁴³

The record indicates that if a previously issued private letter ruling in a similar situation is called to the attention of the IRS in formulating a newly requested ruling the prior ruling will be regarded as most persuasive, if not dispositive.⁴⁴ Further, and more significantly, the IRS has at least once expressly relied on unpublished letter rulings in tax litigation.⁴⁵

On the present record Plaintiffs are correct in their contention that the only difference between the use of earlier rulings by the IRS and earlier decisions by the Courts is that the IRS never *cites* earlier letter rulings in latter ones. Thus even if Defendants' view of the meaning of the statutory language "interpretations adopted by the agency" were correct, all letter rulings and technical advice memoranda in the reference file would still have to be disclosed and indexed.⁴⁶

C. A point not raised by the parties, yet of importance in the Court's view, is that the debate over whether letter rulings are interpretations or precedents, no matter how decided, does not obviate the fact that letter rulings are undoubtedly "records" within subsection (A)(3) of the Act⁴⁷ and therefore subject to mandatory disclosure if no specific exemption is available. The dispute over whether the items are (A)(2) "interpretations" thus has practical significance for this case only insofar as (A)(2) requires a current public index. This may well be of importance to those seeking general information from the IRS, for the required index would aid in identifying the materials sought from the massive IRS files.⁴⁸

II

A. EXEMPTION FOR TRADE SECRETS AND CONFIDENTIAL FINANCIAL INFORMATION 5 U.S.C. § 552(b)(4)

This exemption is claimed by the IRS for all items for which disclosure is sought. There is no dispute that some of the materials here in question may contain confidential commercial or financial information, but there is significant dispute as to the scope and meaning of the exemption. "The Government argues that any information given the Government in confidence falls under this exemption."⁴⁹ This proposition is clearly unsupported by law. The Court of Appeals for this Circuit has held that this provision

exempts only (1) trade secrets and (2) information which is (a) commercial or financial, (b) obtained from a person and (c) privileged or confidential. The exemption given by the Congress does not apply to information which does not satisfy the three requirements stated in the statute.

Getman v. N.L.R.B. 450 F.2d (D.C. Cir. 1971) quoting *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F.Supp. 796, 802 (S.D.N.Y. 1969) A bare claim or promise of confidentiality will not suffice⁵⁰ for the materials must be "independently confidential"⁵¹ based on their contents, i.e., not otherwise subject to public disclosure⁵² and entitled to a reasonable expectation of privacy.⁵³ Further, "the exemption does not protect all data contained in such (materials), but only that information which cannot be rendered sufficiently anonymous by deletion of the filing party's name and other identifying information." *National Cable Television Association, Inc. v. F.C.C.*, No. 24,786 (D.C. Cir. April 17, 1973), Slip Opinion at 22.

Defendants have relied thus far upon their broad claim of entitlement to this exemption. They have made no showing that any information here sought is in fact "independently confidential" and not susceptible to being rendered anonymous. Accordingly, all materials otherwise found nonexempt herein and subject to disclosure will be ordered disclosed *in toto* within thirty (30) days unless within that time the agency bears its burden of demonstrating to the Court entitlement to this exemption for each item sought to be withheld. It is stressed that each such item must be shown to be independently confidential *and* not susceptible to being rendered anonymous. The agency must demonstrate both

Footnotes at end of article.

elements. As to any proposed deletions, the entire item in question must be submitted to the Court with the proposed deletions indicated and accompanied by an explanation of their necessity.⁶⁴

B. EXEMPTION FOR MATTERS SPECIFICALLY EXEMPTED FROM DISCLOSURE BY STATUTE
5 U.S.C. § 552 (b) (3)

This exemption is claimed as to letter rulings, technical advice memoranda, and related correspondence with taxpayers. Defendants contend that 26 U.S.C. § 6103(a) (1) is a specific statutory requirement that these items not be disclosed. Section 6103(a) (1) is the basic provision of the Internal Revenue Code providing confidentiality for tax *returns*.⁶⁵ The rulings and memos, however, are not returns, submitted by taxpayers, but documents generated by the agency. Those documents are, to be sure, based on information submitted by the taxpayer. But, first of all, a request letter from a taxpayer voluntarily submitting information and seeking tax guidance for his own purposes is not a return within the meaning of the statute.⁶⁶ It is only correspondence. If a taxpayer receives an advance letter ruling, or no letter ruling, he may abandon the proposed transaction, in which event the correspondence will never become part of a "return." The fact that some information in certain correspondence *might*, at a later date, be included in a return does not convert the earlier correspondence into a return. Defendants argue that because the taxpayer is advised to file a copy of the ruling with his return,⁶⁷ the ruling thereby becomes a part of the return and confidential under the statute. This is a circular and self-fulfilling rationale which cannot be accepted. Any agency would thus be able to avoid the Freedom of Information Act and public disclosure of its decisions by requiring that the parties later attach copies of the decision to otherwise confidential submissions. This is not the purpose of the Internal Revenue Code or the Freedom of Information Act.

Secondly, to the extent that the taxpayer's interests in confidentiality are involved, they are fully protected by the express exemption from disclosure of truly confidential commercial or financial information.⁶⁸

C. EXEMPTION FOR INTRA-AGENCY MEMORANDA. 5 U.S.C. § 552 (b) (5)

This exemption is claimed as available for (1) correspondence relating to rulings, (2) the index-digest card summaries of rulings in the IRS reference system, and (3) memoranda of conferences and telephone calls (part of the communications relating to rulings). The exemption is not claimed for letter rulings or technical advice memoranda.

Exemption 5 was designed to protect and encourage the full and frank discussion of views within an agency in the formulation of agency policies and decisions. Thus, such expression of views in the decision-making and policy-making context within the agency is exempted from disclosure.⁶⁹ When faced with a disputed claim of this exemption, it is the duty of the Court to inquire into the nature of the materials, by means of affidavits, reference to a special master, or *in camera* review, to ascertain that they do in fact contain such an expression of views and to determine whether such expressions are joined with factual information which can and should be disentwined from the policymaking process.⁷⁰

The parties here have made no showing, by affidavit or otherwise, of the nature or contents of the three types of items for which this exemption is claimed. It is the burden of the agency to justify its claim to exemption by more than blanket and conclusory assertions. In light of the limited volume of materials here involved the Court will order *in camera* review. With regard to the index-digest card system, if as its name implies and defendants themselves argue, this file summarizes rulings which have already been held herein to the subject to disclosure then the index-digest system would likewise have to be disclosed. Any information properly deleted from the ruling itself, under exemption 4, would of course also be deleted from the index-digest of that ruling.

D. EQUITABLE REASONS FOR NON-DISCLOSURE

Defendants argue that even if the Court should find that the materials here in question are subject to required disclosure under the Freedom of Information Act the Court should exercise the discretion inherent in its equitable powers and refuse to order disclosure. It is argued that disclosure would disrupt the

Footnotes at end of article.

agency's established procedures and possibly mean the end of the rulings program as it is presently known. Those consequences may well arise,⁶¹ but here again Defendants' position is contrary to established precedent. Once a determination is made that materials come within the terms of the statute by which Congress has required disclosure the Court does not have discretion to refuse to order disclosure.⁶²

Finally, it is clear from the record herein that private letter rulings are in fact widely disseminated among the tax bar and taxpayers with similar interests and problems, and that the IRS is aware of this practice.⁶³ Thus a body of "private law" has in fact been created which is accessible to knowledgeable tax practitioners and those able to afford their services. It is only the general public which has been denied access to the IRS' private rulings. The IRS' argument that publication would cause grave damage to its ruling system, then, is viewed by this Court as a specter having little basis in fact. Those taxpayers most likely to rely upon or challenge the rationale of letter rulings issued to others already have access to many rulings through their own efforts. Publication would simply make available to all what is now available to only a select few, and subject the rulings to public scrutiny as well. Such public availability and scrutiny are the very fundamental policies of the Freedom of Information Act. For, "one fundamental principle is that secret law is an abomination."⁶⁴

Appropriate Orders will be entered.

AUBREY E. ROBINSON, Jr., *Judge*.

JUNE 6, 1973.

FOOTNOTES

¹ Plaintiffs' Motion for Summary Judgment speaks in broad terms of "Defendants' files," apparently meaning *all* of Defendants' files of letter rulings and technical advice memoranda. Yet the Complaint in this case was limited, seeking only such items as they related to determinations under Section 613(c) of the Internal Revenue Code of 1954, 26 U.S.C. § 613(c), for the period July 26, 1968 to October 1, 1971. Accordingly, relief must be thus limited in this case. It is only as to those items originally named in the Amended Complaint herein that the record indicates that Plaintiffs' request for access was denied by the agency.

² 26 C.F.R. § 601.701 et seq.

³ 5 U.S.C. § 522(a) (3), *Environmental Protection Agency v. Mink*, — U.S. —, No. 71-909, January 22, 1973, (41 U.S.L.W. 4201) Slip Opinion at 6.

⁴ 26 C.F.R. § 601.201(a) (2); Defendants' Statement of Material Facts, ¶ 7. Cf. Rev. Proc. 72-3, I.R.B. 1972-1, 9, Section 2.02. Letter rulings are issued only by the National Office of the IRS, which issues approximately 30,000 such rulings each year.

⁵ Defendants' Statement of Material Facts ¶ 9, ¶ 12. Cf. Rev. Proc. 72-3, I.R.B. 1972-1, 9, Section 13.01.

⁶ Defendants' Statement of Material Facts, ¶ 10. Cf. Rev. Proc. 72-3, I.R.B. 1972-1, 9, Section 6.14.

⁷ 26 C.F.R. § 601.105(b) (5), et seq., Rev. Proc. 69-2, 1969-1 C.B. 386, superseded by Rev. Proc. 72-2, 1972-1, I.R.B. ¶ 5. Points and Authorities in Support of Defendants' Motion for Summary Judgment (hereafter Defendants' Brief) at 7. See especially 26 C.F.R. § 601.105(b) (5) (vii).

⁸ *Id.*

⁹ *Id.*, especially 26 C.F.R. § 601.105(b) (5) (iv) (e).

¹⁰ Defendants' Brief at 8. Defendants' Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgment, March 12, 1973 (hereafter Defendants' Opposition) at 4.

¹¹ Defendants' Brief at 7.

¹² *Id.*

¹³ Defendants' Opposition at 1-2.

¹⁴ Defendants' Brief at 8. Plaintiffs initially sought all communications relating to the letter rulings and t.a. memos in question, specifically including communications to or from members of Congress and their staffs. Defendants have indicated that the only communications in existence are those to or from the taxpayer.

¹⁵ Defendants' Statement of Material Facts, ¶ 8. Cf. Rev. Proc. 72-3 I.R.B. 1972-1, 9, Section 2.06. Revenue Rulings are published in the Internal Revenue Bulletin for the information and guidance of the taxpayer, the I.R.S. and the general public. *Id.* Revenue Rulings are issued only by the National Office of the IRS, which issues approximately 650 such rulings each year. Defendants' Statement of Material Facts ¶ 8, ¶ 13. Revenue Rulings, like letter rulings, are narrowly based in that they are usually premised on a given fact situation. In this way Revenue Rulings differ from Income Tax Regulations, which are also formally published but are of more general applicability.

¹⁶ As to IRS rules, regulations, decisions and procedure generally, see 26 C.F.R. § 601.601 (Rules and Regulations); 26 C.F.R. § 601.201 (Rulings and Determinations Letters); 26 C.F.R. § 601.105(b) (5) (i-vii) (Technical Advice Memoranda); Goodrich, Redman and Quiggle *Procedure Before the Internal Revenue Service*, American Law Institute (Philadelphia, 1965); Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 Taxes 756 (1965).

¹⁷ 5 U.S.C. § 552(a) (2) (1967):

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) . . .

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; . . .

¹⁸ 5 U.S.C. § 552(a) (3) (1967):

Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published.

¹⁹ Defendants' Statement of Material Facts ¶ 7; 26 C.F.R. § 601.201(a)(2).

²⁰ *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *United States v. Oregon*, 366 U.S. 643, 648 (1961).

²¹ *Hanover Bank v. Commissioner*, 369 U.S. 672, 686 (1962). See K. Davis, *Administrative Law Treatise* (1970 Supp.) § 3A.9.

²² *Gibson Wine Co. v. Snyder*, 194 F. 2d 329, 90 U.S. App. D.C. 135 (D.C. Cir. 1952), *American President Lines, Ltd. v. Federal Maritime Commission*, 316 F. 2d 419, 114 U.S. App. D.C. 418 (D.C. Cir. 1963). See generally, K. Davis, *Administrative Law Treatise* (1958) §§ 5.03-06; (1970 Supp.) § 5.01-06.

²³ Such a course on the part of the agency, however, might be raised as evidence of arbitrariness or inconsistency in any subsequent challenge to the agency's latest interpretation. This is undoubtedly one of the fears lurking in the background of the agency's position in this case. Yet the ideal is not to conceal arbitrariness and inconsistency but to eliminate it. Such elimination is best served by disclosure and that is precisely the purpose of the Freedom of Information Act.

²⁴ See K. Davis, *Administrative Law Treatise* (1970 Supp.) § 3A.9 at 130.

²⁵ *Id.* at 131.

²⁶ *N.L.R.B. v. Plasterers' Union Local No. 79*, 404 U.S. 116, 129 (1971), *United States v. Dickerson*, 310 U.S. 554, 562 (1940).

²⁷ See K. Davis, *Administrative Law Treatise*, (1970 Supp.) §§ 3A.2, 3A.9; *Hawkes v. I.R.S.*, 467 F. 2d 787, 794, 797, (6th Cir. 1972); *Stokes v. Hodgson*, 347 F. Supp. 1371, 1374, (N.D. Ga. 1972), *aff'd sub nom. Stokes v. Brennan*, No. 72-2946 (5th Cir. April 3, 1973).

²⁸ Senate Report No. 813, Cong. 1st Sess. (1965) at 6-7:

... agencies must make available ... those statements of policy and interpretations which have been adopted by the agency and are not required to be published in the Federal Register. ...

²⁹ The Supreme Court in *Mink* expressly found that "the language of the Act itself is sufficiently clear in this respect" (Slip Opinion at 9) and merely cited the House Report for emphasis.

³⁰ See *Frankel v. S.E.C.*, 460 F. 2d 813, 816 n. 5 (2d Cir. 1972).

³¹ *Weisberg v. Department of Justice*, No. 71-1026, (D.C. Cir. Feb. 28, 1973) Slip Op. at 8; *Fisher v. Renegotiation Board*, 473 F. 2d 109, 111 (D.C. Cir. 1972); *Getman v. N.L.R.B.*, 450 F. 2d 670, 672 (D.C. Cir. 1971); *Soucie v. David*, 448 F. 2d 1067, 1080 (D.C. Cir. 1971); *Bristol-Myers Company v. F.T.C.*, 424 F. 2d 935, 938-40 (D.C. Cir. 1970); *Wellford v. Hardin*, 444 F. 2d 21, 25 (4th Cir. 1971).

³² *Hawkes v. I.R.S.*, 467 F. 2d 784, 787 (6th Cir. 1972).

³³ Defendants' Opposition at 4. *Simmons Dep.*, pp. 10-23.

³⁴ Defendants' Opposition at 4. *Simmons Dep.*, pp. 27-29. The ruling writer determines in which file the ruling will be placed.

³⁵ *Id.* Files occupying over two thousand linear feet of shelf space were laboriously re-stamped "reference" in place of "precedent." *Simmons Dep.*, pp. 18, 58-59.

³⁶ Defendants' Opposition at 5; *Simmons Dep.*, pp. 27, 36, *IRS Manual* (11) 633.82.

³⁷ Defendants' Opposition at 5-6; *Simmons Dep.*, pp. 38-39; *Levine Dep.*, pp. 18-19; *Singer Dep.*, p. 21; *Davitt Dep.*, p. 7.

³⁸ Defendants' Opposition at 6; *Levine Dep.*, p. 21; *Davitt Dep.*, p. 32.

³⁹ Defendants' Opposition at 7; *Levine Dep.*, p. 21; *Singer Dep.*, p. 7.

⁴⁰ Defendants' Opposition at 7; *Sheets Dep.*, 33. See *National Cable Television Association, Inc. v. F.C.C.* No. 24,786 (D.C. Cir. April 17, 1973); Slip Opinion at 15-16, where another agency argued unsuccessfully that it had not relied on certain documents but only on its "knowledge" derived from them.

⁴¹ Defendants' Opposition at 7; *Davitt Dep.*, pp. 24-26.

⁴² *Black's Law Dictionary* defines precedent as follows (Rev. 4th Ed. 1968 at 1340):

An adjudged case or decision of a court of justice considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.

⁴³ "... (C)hanges in position are made only after the most careful research and analysis and consideration at appropriately higher levels of review." *IRS Manual* (11) 152. The "appropriate level of review" is at least the highest level at which the earlier ruling was finally approved. *Manual* (11) 633.82, Item 7(b); *Singer Dep.*, pp. 5-6.

⁴⁴ *Troyer Dep.*, p. 11; *Jones Dep.*, pp. 17-26; *Nolan Dep.*, pp. 29-31.

⁴⁵ *United States Thermo Control Co. v. United States*, 372 F. 2d 964, 967 (Ct. Cl.) cert. denied 389 U.S. 839 (1967). The letter rulings relied upon by the IRS were held inconsistent with published rulings. See Reid, *Public Access to Internal Revenue Service Rulings*, 41 Geo. Wash. L. Rev. 23, 24, 32 (1972).

⁴⁶ This consequence would be somewhat more narrow than that required by the Courts' holding in *I-A, supra*. The Court has held that *all* letter rulings and technical advice memos are interpretations adopted by the agency and must therefore be disclosed and indexed. If Defendants theory as examined in *I-B* is accepted as analyzed here only those letter rulings and technical advice memoranda in the *reference* files would have to be disclosed and indexed.

⁴⁷ 5 U.S.C. § 552(a)(3):

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records ... shall make the records promptly available to any person.

⁴⁸ See *Irons v. Schnyler*, 465 F. 2d 608 (D.C. Cir. 1972), *National Cable Television Ass'n, Inc. v. F.C.C.*, No. 24,784 (D.C. Cir. April 17, 1973).

⁴⁹ Defendants' Opposition (3/12/73) at 9.

⁵⁰ *Bristol-Myers Company v. F.T.C.*, 424 F. 2d 935 (D.C. Cir. 1970); *Getman v. N.L.R.B.*, 450 F. 2d 670, 673 (D.C. Cir. 1971); *Legal Aid Society v. Schultz*, 349 F. Supp. 771, 776 (N.D. Cal. 1972); Cf. *St. Regis Paper Co. v. U.S.*, 368 U.S. 208 (1961). To allow a promise of confidentiality by the agency to control would enable the agency to render meaningless the statutory scheme. Defendants' argument to the contrary is based on language of the House Report on the Act: "Moreover, where the Government has obligated itself in good faith not to disclose documentations or information which it receives, it should be able to honor such obligations." House Report No. 1497, 89th Cong. 2d Sess. 10 (1966). Yet here again this Court finds that the House Report "is characteristically broader and goes beyond the express terms of the statute." *Getman v.*

N.L.R.B., 450 F. 2d 670, 673 (D.C. Cir. 1971); Cf. K. Davis, *Administrative Law Treatise* (1970 Supp.) §§ 3A.2, 3A.23. See Notes 27-32 and accompanying text, *supra*.

⁶¹ *Fisher v. Renegotiation Board*, 473 F. 2d 109, 113 (D.C. Cir. 1972), *M. A. Schapiro & Co. v. S.E.C.*, 339 F. Supp. 467, 470-71 (D.C.C. 1972).

⁶² *Fisher v. Renegotiation Board*, 473 F. 2d 109, 113 n. 4 (D.C. Cir. 1972).

⁶³ *Getman v. N.L.R.B.*, 450 F. 2d 670, 674 (D.C. Cir. 1971), *Bristol-Myers Company v. F.T.C.*, 424 F. 2d 935, 938 (D.C. Cir. 1970); *Grunnman Air Craft Engineering Corp. v. Renegotiation Board*, 425 F. 2d 578, 580 (D.C. Cir. 1970).

⁶⁴ See *Fisher v. Renegotiation Board*, 473 F. 2d 109, 113 (D.C. Cir. 1972).

⁶⁵ 26 U.S.C. § 6103(a)(1):

Returns . . . shall constitute public records; but except as hereinafter provided . . . they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President.

⁶⁶ 26 C.F.R. § 301.6103(a)-1(a)(3) defines "return" to include:

(a) Information returns, schedules, lists and other written statements filed by or on behalf of the taxpayer with the Internal Revenue Service which are designed to be supplemental to or become part of the return, and

(b) Other records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a) of this subdivision.

⁶⁷ Note 6 and accompanying text, *supra*.

⁶⁸ See II-A, *supra*.

⁶⁹ *Environmental Protection Agency v. Mink*, — U.S. — (January 22, 1973), 41 U.S.L.W. 4201, No. 71-909, *Bristol-Myers Company v. F.T.C.*, 424 F. 2d 935, 939 (D.C. Cir. 1970), *Soucie v. David*, 448 F. 2d 1067, 1078 (D.C. Cir. 1971), *National Cable Television Ass'n, Inc. v. F.C.C.* No. 24, 786 (D.C. Cir. April 17, 1973), Slip Op. at 20-22, *Tennesseean Newspapers, Inc. v. F.H.A.*, 464 F. 2d 657, 660 (6th Cir. 1972).

⁷⁰ *Environmental Protection Agency v. Mink*, — U.S. —, No. 71-909, January 22, 1973, 41 U.S.L.W. 4201, Slip Op. at 11-20; *National Cable Television Ass'n, Inc. v. F.C.C.*, No. 24, 786 (D.C. Cir. April 17, 1973), Slip Op. at 20-22.

⁷¹ *Wellford v. Hardin*, 444 F. 2d 21, 24 (4th Cir. 1971):

"The Freedom of Information Act was not designed to increase administrative efficiency, but to guarantee the public's right to know how the Government is discharging its duty to protect the public interest.

⁷² *Soucie v. David*, 448 F. 2d 1067, 1077 (D.C. Cir. 1971), *Getman v. N.L.R.B.*, 450 F. 2d 670-680 (D.C. Cir. 1971), *Wellford v. Hardin*, 444 F. 2d 21, 24-25 (4th Cir. 1971); *Tennesseean Newspaper, Inc. v. F.H.A.*, 464 F. 2d 657, 661-62 (6th Cir. 1972); *Hawkes v. I.R.S.*, 467 F. 2d 787, 792 n. 6 (6th Cir. 1972).

⁷³ *Troyer Dep.*, pp. 5-7, 11; *Jones Dep.*, pp. 15-16, 17, 18, 26; *Nolan Dep.*, pp. 29, 31; *Steinbunchel Dep.*, p. 13; *Levine Dep.*, pp. 11-12; *Stafford Dep.*, pp. 6, 8, 11, 12-14, 21-22.

⁷⁴ K. Davis, *Administrative Law Treatise* (1970 Supp.) § 3A.12. Cf. *Sterling Drug Co. v. F.T.C.*, 450 F. 2d 698, 708 (D.C. Cir. 1971):

. . . (P)ivate transmittals of binding agency opinions and interpretations should not be encouraged. These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it.

TAX ANALYSTS AND ADVOCATES, THOMAS F. FIELD

v.

INTERNAL REVENUE SERVICE, ET AL.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 841-72

ORDER

Upon the considerations expressed in the Opinion entered herein this date, and upon consideration of the entire record, it is this 6th day of June, 1973,

ORDERED, that Defendants' Motion for Summary Judgment be and hereby is denied, and it is

FURTHER ORDERED, that Plaintiffs' Motion for Summary Judgment be and hereby is granted, and it is

FURTHER ORDERED, that Defendants shall make available to Plaintiffs for inspection and copying within thirty (30) days of date all letter rulings, technical advice memoranda and communications sought by Plaintiffs herein, intact and without deletion, except for those items which, within said thirty (30) days period, Defendants submit to the Court, sealed and intact, without deletion but with any proposed deletions indicated, for in camera review as to whether proposed deletion of information is justified under the Freedom of Information Act, together with a detailed written explanation of the justification for each deletion, and it is

FURTHER ORDERED, that Defendants shall make available to Plaintiffs for inspection and copying within thirty (30) days of date all items in the Internal

Revenue Service's index-digest reference card file sought by plaintiffs herein, and all memoranda of conferences and telephone calls relating to the letter rulings and technical advice memoranda involved herein, unless within said thirty (30) day period those items are submitted to the Court for in camera review as to whether they may be properly withheld as internal memoranda within the meaning of exemption 5, 5 U.S.C. § 552(b) (5), of the Freedom of Information Act.

AUBREY E. ROBINSON, Jr., *Judge*.

JUNE 6, 1973.

[From the Monthly Labor Review, September 1973]

WAGE AND PRICE CONTROLS DURING THE AMERICAN REVOLUTION

IN EARLY AMERICA, TOO, NATIONAL, STATE, AND LOCAL GOVERNMENTS TRIED TO HALT
THE SPIRALING INFLATION

(By Jonathan Grossman*)

In the year 1973, a public opinion poll reports that the problem most on the minds of Americans is how to combat soaring inflation, and one of the most hotly argued issues is over the effective use of wage and price controls.

During the American Revolution, too, when changes that altered the future course of history were taking place, one of the greatest concerns of the people of the newly emerging nation was how to curb the astronomical rise in the cost of necessities of life. And perhaps the most controversial economic question of those days was: Should the government impose ceilings on wages and prices? Though historical analysis will reveal significant differences between historical and modern experiences with wage-price controls, there are similarities that are both fascinating and instructive.

Wage and price regulation goes far back into history. The Roman Emperor Diocletian, in the fourth century A.D., not only prescribed ceilings on prices and wages, but also froze workers to their jobs. In the 13th century, Kublai Khan, the great Mongol who ruled four-fifths of the Eurasian Continent from China to Russia, decreed maximum prices. Medieval Europe followed a system of "just price" which embraced costs of both labor and commodities. The English Ordinance of Labourers in 1349 was the first of a series of British laws setting maximum wages. Mercantilist practice at the dawn of modern economic history involved intricate economic regulations.

The tradition of wage and price controls carried over to several North American colonies, and most particularly to Massachusetts Bay, "the happy hunting ground for paternalistic controls over religion, morals, and business."¹ By 1630, within a year of its settlement, the Colony set maximum wages in the building trades and 3 years later curbed the "extortion used by diverse persons of little conscience" by establishing sweeping wage ceilings and limiting colonial prices to one-third above the English level.²

The Puritans believed that God was on their side, and in 1636 a committee proposed a code, including wage and price limitations, which was "agreeable to the word of God."³ A Puritan writer classed violators of wage and price laws with "adulterers and whoremongers." Workers who took excessive wages were punished. For example, in 1639, Edward Palmer, a carpenter accused of charging too much for building the Boston stocks, was fined heavily and, with Puritan irony, sentenced to sit in the stocks which he himself had built.⁴

Yet, though wage and price laws continued in several colonies for many years, they lost their effectiveness. Governor John Winthrop recognized, as early as 1640, that workers who were restrained "would either remove to other places where they might have more, or else being able to live by planting and other employments of their own, they would not be hired at all. . . ."⁵ By the time of the American Revolution most controls had yielded to the realities of an abundance of free land, a scarcity of free labor, a growing egalitarianism, and increased social mobility.⁶

COMPLEXITY OF CONTROLS

Soaring wages and prices during the era of the American Revolution brought about a revival of wage-price controls. The history of such controls is extraordinarily complex because of the delicate problem of legal authority and the lack of

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a strong central government. The Continental Congress, regional conventions of States, State governments themselves, counties and towns within the State, conventions of local authorities, along with committees of correspondence, inspection, and public safety, all participated directly or indirectly in "acts to prevent monopoly and oppression," as maximum wage-price laws were then called.

The Continental Congress set price ceilings even before the Declaration of Independence. The signing of the Articles of Association on October 20, 1774, is considered by some historians as marking the birth of the United States. Among other provisions the Association agreed "that all manufactures of this country be sold at reasonable prices" and that "venders of goods or merchandise will not take advantage of the scarcity of goods, that may be occasioned by this association, but will sell the same at rates we have been respectively accustomed to do, for twelve months last past."⁷

The Continental Congress blew hot and cold on the issue of price fixing. In 1775 and 1776 it suggested maximum prices on tea, coffee, salt, sugar, and other imports, and limited the markup on goods for soldiers to 5 percent. Town officials and local committees also set prices and sometimes turned to Congress for advice. In reply to a question by the Philadelphia committee of inspection on price fixing, Congress suggested that maximum prices be terminated in order to encourage business to take risks. But when the cost of goods needed by the army soared, Congress called for correction of the abuse.⁸

THE PROVIDENCE CONVENTION

Because in a loose confederation the power of Congress was limited, a major drive against rising costs and "the most extravagant Price of Labour" was initiated by a convention of New England States at Providence, R.I. Many towns in New England had petitioned their State legislatures for relief from the "exorbitant prices of goods."⁹ The State of Connecticut responded by passing several laws to "prevent monopoly and oppression." Since economic stabilization in a single State was difficult, the Massachusetts legislature selected a committee to join committees from other New England States at Providence. On December 31, 1776, 13 delegates from Massachusetts, New Hampshire, Connecticut, and Rhode Island recommended maximum wages and ceiling prices on articles "absolutely needful for their very existence."¹⁰

The recommendations of the Providence Convention were presented both to Congress and to the New England State legislatures. During the month of February 1777, many delegates to the Continental Congress participated in heated debates. Samuel Adams, the radical from Massachusetts, reported that controls were "much applauded as being wise and salutary." His more conservative Massachusetts colleague, John Adams, conceded their popularity, but felt in the long run no good could come from regulation. Richard Henry Lee of Virginia compared the brutal inflation to a spasm and controls to a "palliative medicine." Dr. Benjamin Rush of Pennsylvania replied to the medical analogy by diagnosing the malady not as a "spasm, but a dropsy" or tumor and prescribed a strong financial prescription based on rising interest rates for borrowed money and on higher taxation. Other delegates to Congress participated in arguing the sins and virtues of limiting wages and prices. Congress vacillated, first approving and then disapproving of the action of the Providence Convention, and then finally evaded the issue by referring similar measures for the "serious consideration" of other States which were to meet at new interregional conventions. At such a convention in York, Pa., in the spring of 1777, delegates from New York, New Jersey, and Virginia favored controls, while those from Delaware, Pennsylvania, and Maryland were opposed.¹¹ The resulting deadlock prevented action.

STATE ACTS

The New England States responded more positively to the Providence Convention than did Congress or the Middle States. Connecticut, New Hampshire, Rhode Island, and Massachusetts passed laws according to the recommendation of the Providence Convention. The Massachusetts response was typical. Many citizens, angered by inflation, fiercely denounced price and wage extortion whereby a few got rich by inflicting suffering on the many. The Massachusetts "Act to Prevent Monopoly and Oppression" blamed "avaricious conduct" for adding to the "now exorbitant price of every necessary and convenient article of life, and increasing

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the price of labour. . . ." Such "pernicious" acts disheartened soldiers, distressed the poor, and undermined the state.

Therefore, Massachusetts, on January 28, 1777, fixed the cost of farm labor not to exceed 3 shillings a day in summer and in "usual proportion at other seasons of the year, and the labour of *Mechanics* and *Tradesmen*, and other labour . . . in proportion thereunto . . . when compared with farming labour." The law also fixed maximum prices on approximately 50 commodities and services such as 7s. 6d. per bushel of wheat, 4d. half penny a pound for "fresh pork well-fatted and of a good quality," 3s. 10d. for a gallon of New England rum, 5d. a pound for "*Dunghill fowls*, and *Ducks*," 10d. a pound for butter, 8s. for a pair of shoes, 30s. for a barrel of blubber, 1s. 6d. per ton weight mile in most areas for teaming, and 2s. a night in Boston for horse-keeping with English hay.¹²

Massachusetts patriots supported wage and price ceilings. Town meeting after town meeting endorsed the law. And some towns, such as Boston, increased the scope of the act by setting prices on additional commodities not enumerated in the State law.¹³

RETREAT FROM CONTROLS

Yet even in the flush of initial enthusiasm, there were indications that some merchants were unhappy with regulated prices and preferred barter to regulated prices. Cushing and White advertised plaintively that they sold salt at the regulated price but buyers would "be look'd pleasant at, if they stow a few turkeys or fowls in one corner of their baggs."¹⁴ Farmers accused merchants of withholding manufactured and imported goods, and city dwellers accused farmers of holding back food for a rise in price. Arguments developed over whether the scarcity of goods was real or artificially induced.

On May 10, 1777, barely 3 months after passage of its initial law, Massachusetts raised ceiling prices and granted authority to towns to adjust wages and prices of many commodities not fixed under State law.¹⁵ Similarly other States which had embraced wage and price controls found it necessary to revise their codes upwards.¹⁶

Soaring prices and problems of enforcement brought New York and the New England States to another multi-State convention, this time at Springfield, Mass., in the summer of 1777. Noting that the acts against monopoly and oppression were "attended with inconveniences," the Springfield Convention recommended that the States repeal their wage-price laws. The States complied. The preamble of the Massachusetts law, for example, recognized that wage-price laws passed earlier that year had failed to serve the purpose for which they had been intended and repealed the two "acts . . . to prevent monopoly and oppression."¹⁷

For a time at the end of 1777, it seemed that the pendulum would swing back toward controls. The Continental Congress proposed new regional conventions of the States, and eight Middle Atlantic and New England States met at New Haven, Conn. The New Haven Convention tried to put a lid on the dreadful inflation that threatened "destruction of the common cause." Though its recommendations were complex, the key provision was that the States hold increases in wages, manufactures, and domestic produce to not more than 75 percent over 1774 levels. But only Connecticut enacted such a law.¹⁸

In the meantime, the ambivalent Continental Congress once again reversed itself. In June 1778, Congress declared that

it hath been found by Experience that Limitations upon the Prize of Commodities are not only ineffectual for the Purposes proposed but likewise productive of very evil Consequences to the great Detriment of the public Service and grievous Oppression of Individuals.

Congress then recommended that those States which still had laws "limiting, regulating, or restraining" prices should repeal them.¹⁹

THE TOWNS TO THE RESCUE

With the failure of interstate conventions and State laws, the cause of wage-price control was quite sick. But its adherents would not let the patient die. They argued that the salvation of the country depended on the virtue of its people whom they urged to resist the evil temptation of monopoly and oppression. Newspapers tried to rally support. The *Boston Gazette*, for example, carried an imaginary dialogue between a greedy farmer holding back his wheat for higher prices and a poor widow who must starve, while brave soldiers must go hungry

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because of the high price of bread.²⁰ Inflation had become so severe that General George Washington complained of "a scarcity of food" and observed in April 1779 that "a waggon load of money will scarcely purchase a waggon load of provisions."²¹

In 1779, towns tried to accomplish by public opinion what the Continental Congress, multi-State conventions, and State legislatures had failed to accomplish. Boston, whose inhabitants had suffered severely from inflation, was among the leaders. On May 25, 1779, the town began to establish monthly price lists for various articles. The Boston merchants even agreed to roll back prices on rum, sugar, tea, salt, and other goods. Many other Massachusetts towns followed suit.

The Boston Committee of Correspondence recommended that similar committees from all the towns in Massachusetts meet at Concord on July 14, 1779, to regulate wages and prices. The towns responded to this "glorious attempt" and 170 delegates from 140 towns came to Concord. The convention sought to check price increases and to set maximum wages. Many towns set up their own wage-price scales, and groups of towns met to iron out variations between localities so that their codes would not conflict. Boston continued in the forefront. Thus, on August 16, 1779, Samuel Adams served as "moderator" at a meeting of freeholders which called for a reduction of 20 percent on imported goods and set prices for "labour and manufactures" which would be the "highest which shall be demanded or given in the future."²²

The Massachusetts movement seemed infectious, and towns in other States held conventions. A meeting of Rhode Island towns at East Greenwich set maximum wages and prices. Elsewhere, localities in New Hampshire, upper New York, New Jersey, Delaware, and Pennsylvania established controls. The wage and price scales of these local codes ran from 15 to 20 times as high as the scales announced less than 3 years earlier at the Providence Convention. A common laborer in Boston, who earned 3 shillings in early 1777, was paid 60 shillings by mid-1779.

The hopes rekindled by the grass roots movement for regulation stimulated a new multi-State convention. On October 20, 1779, delegates from New York met once again with those from New England at Hartford. Blaming the opulent farmer, trader, engrosser, and monopolizer, the Hartford convention urged nationwide price limitations. Congress, upon receiving the report from Hartford, in turn suggested still another convention, this time at Philadelphia. Congress also asked States to enact laws limiting wage and price increases "not to exceed twenty-fold" the levels of 1774.²³

ENFORCEMENT

Enforcing wage-price controls was difficult and took several forms—legal and extralegal. Some States tried to fine violators. Following a recommendation of the Providence Convention, several New England States, in 1777, ordered fines of 20 shillings for overcharging on goods up to 20 shillings, and for articles over 20 shillings a "sum equal to that for which such article shall be sold." Similarly, a worker who took more than ceiling wages was to "forfeit and pay a like sum of money, to that which he shall take and receive for such service and labour." Innkeepers, liquor dealers, and others in licensed trades could lose their license for overcharging.²⁴

However, only a few cases of legal penalties appear in the records. Richard Morris, the leading authority in government and labor in early America, concludes that the "relative infrequency of prosecutions" shows conclusively that "courts functioned only in a minor way" in enforcing economic regulations.²⁵

In the absence of legal action, force and threats of force sometimes intimidated would-be price violators. In Albany, N.Y., "monopolizers" might be forced to stand on a scaffold in the marketplace and swear to observe regulations.²⁶ In Philadelphia, Tom Paine and a Committee of Inspection seized a cargo of flour from the allegedly patriotic financier Robert Morris, and in the summer of 1779 a Philadelphia mass meeting warned price violators "we have arms in our hands and know the use of them."²⁷ In New England, Major General Horatio Gates blamed British agents for price increases and ordered the apprehension of "extortioners" so that they "may be dealt with as the case may require."²⁸

In Boston, one Joyce Jr. advertised for patriots "to carry into execution the act of this State to prevent Monopoly and Oppression." He had taken his fictitious name from the original Joyce, who had arrested King Charles I and was alleged

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to be one of the two masked regicides at the King's execution. Abigail Adams, writing to her husband John Adams, described how a band of 500 followed Joyce Jr. "who was mounted on horseback, with a red coat, a white wig, and a drawn sword, with drum and fife following." This band "carted" five terrified "Tory Villains" outside the town limits of Boston, overturned the cart, and warned them not to return to Boston. Joyce Jr. advertised his thankfulness that his admonition to shopkeepers had reminded at least some of them of their duty to sell at fixed prices. In Boston, also, a mob of 100 women raided the store of Thomas Boylston and marched away with coffee he refused to sell for less than 6 shillings a pound.²⁹

Though dramatic, such incidents were relatively rare. Social and economic pressures, ostracism, villification, and public denunciation were more important tools than violence in attempting to enforce wage and price controls. The Continental Congress, in 1774, had set the precedent when it resolved that if any vender sell at "higher terms" than agreed upon, "no person, ought, nor will any of us deal with any such person, or his or her factor or agent, at any time thereafter. . . ." ³⁰ Local committees of correspondence, inspection, safety, even before the Declaration of Independence, denounced price violators as "enemies of the American cause." ³¹

During the Revolution public castigation took several forms. Sometimes towns would "cry out" violators. Watertown, Mass., ordered that persons selling goods at excessive prices would be labeled "enemies of their country and cried as such by the town clerk" for 6 months after every public town meeting.³²

More common than "crying" was "publication." Patriotic newspapers carried on a campaign against "dirty little hawkers and forestallers," who undermined the cause of independence and oppressed the poor by adding to the "exorbitant price" of necessities and "increasing the price of labour." A letter writer to the *Boston Gazette* addressed himself to "Monopolizers," saying: "You are a vermin among people. . . . You are worse enemies to the country than Burgoyne." A writer to another newspaper called price violators robbers and thieves.³³

As the Revolution progressed, "publication" of "enemies of the country" became more formal. For example, in 1779 the Committee of Thirteen, appointed by the town of Boston, published the names of offenders.

as enemies to their country, that the public may abstain from all trade and conversation with them, and the people at large inflict upon them that punishment which such wretches deserve . . .³⁴

Often the victims of denunciations struck back. John Nazro denied offering 6 shillings a bushel for corn and 8 shillings for rye and offered a reward "to any person who will produce the author of such a malicious and infamous falsehood." Martin Bickler advertised that "some infernal liar and enemy" was ruining his character and promised 50 pounds to anyone who could inform him "who this slanderer is." Even when the accused admitted to paying more or selling above the stipulated price, he usually defended himself. Thus, a Boston hatter who sold a beaver hat for 48 pounds, or 13 pounds above ceiling, insisted that the regulated price was ridiculously low. Other Boston hatters supported him and argued that he was performing a service by relieving the shortage of hats and that "country hatters" sold no better hats for more.³⁵

A weapon too often used becomes dull. The venom of denials indicates that publicity had some effect. But frequent charges and countercharges and divided opinion diminished the effect of "publication."

THE END OF CONTROLS

As the decade came to an end, the States were afraid to impose new controls. Massachusetts had warned its delegates that, though it recognized the virtue of effective regulation, previous controls had "discouraged Husbandry and Commerce," and that enforcement hurt honest persons but was of no avail against real monopolizers.³⁶ Though States discussed legislation, no new laws went into effect.

The drama of futility was nearing its end. One of the enduring problems of wage-price controls is that though they are directed against inflation, they also redistribute income. In 1777 controls had been described by supporters as the "highest pinnacle of justice" that "rightly considered the several classes of men, allotting to the farmer, to the manufacturer, to the day labourer, and to

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the trader, the allowance respectively proper for them." But toward the end of the Revolution, wage-price regulations were considered to be breeders of injustice and of class antagonisms. So many opposing interests each tried to rig controls in their favor that prices and wages were seldom in fair proportion and some got rich at the expense of others. By the time the multi-State convention met in Philadelphia in February 1780, advocates of wage-price controls recognized that they had failed. The Convention made no attempt to revive laws to "prevent monopoly and oppression," which had a quiet and almost unmourned death.³⁷

LESSONS TO BE LEARNED

It is natural to compare earlier wage-price controls with those of our own times to see what lessons might be learned or what points might be proved. Conventional wisdom under laissez faire economics has affirmed that America's economic greatness grew out of a free enterprise system and that regulation in early America was an aberration which was corrected by American experience. Certainly, throughout the era of the Revolution, laws to prevent "monopoly and oppression" failed to stem inflation.

With selected facts some startling analogies might be made between Revolutionary and contemporary wage-price controls. During the Revolution, after prices moved up, the first phase was to impose wage and price ceilings. Within a few months another phase was exemption of some products to encourage production. During a new phase, higher ceilings were established. Then controls were dropped altogether, only to be reinstated when wages and prices again leaped forward. Inequities developed. Workers, in particular, claimed they bore a disproportionate burden because ceiling wages did not reflect the true increase in the cost of living. Several States imposed embargoes on shipments outside the State to prevent shortages at home.

Shorn of their colonial quaintness, many arguments made during the Revolution have a modern ring. Several statements made by John Adams could have come from the present officials of the Administration. And the gospel preached by the present day apostle of free enterprise, Milton Friedman, could well have been that of Pelatiah Webster in 1779. Friedman writes that "price and wage ceilings do not eliminate inflationary pressure. At most they suppress it. And suppressed inflation is vastly more harmful than open inflation," because dampening price levels discourages increased production.³⁸ Pelatiah Webster argued nearly two centuries earlier that low regulated prices would cause producers to hold back goods from the market, which would push prices even higher. He compared regulation to water sprinkled on a blacksmith's forge, which indeed deadens the flame for a moment, but never fails to increase the *heat and force* of the internal fire.³⁹

But there are differences, as well as similarities, which suggest that comparability between the periods should not be exaggerated. At the time of the Revolution the United States was a small and predominantly agricultural nation where most inhabitants were to some degree self-sufficient. Except for some imports there was virtually no national market. When controls squeezed too tightly, barter could substitute for money and it is hard to conceive of a situation today when *The New York Times* or *The Washington Post* might, like the Boston publishers in 1779, suggest to their readers that they pay in butter, cheese, or Indian corn.⁴⁰ The central government was almost impotent and generally was limited to making recommendations. And while the present American dollar may be "soft," it hardly compares with the situation during the Revolution where the states and the Continental Congress alike indulged in an orgy of paper currency. In early 1781, Virginia fixed the price of a cavalry horse at \$150,000 Continental.⁴¹ Between January 1777 and April 1781, when trading in Continental money ended, the value of "hard" money increased 167-fold in relation to the money issued by the Continental Congress. The phrase "not give a continental" became a colloquialism for worthlessness.

How applicable are the experiences of the Revolutionary period may be debatable. But it is useful to be reminded that the problem of inflation—and the recourse to controls—are almost as old as recorded history, and there have been times in world history and early American experience when major efforts were made to curb runaway costs by imposing ceilings on wages and prices.

FOOTNOTES

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*Jonathan Grossman, a social science adviser, serves as historian for the U.S. Department of Labor. Pamela Violante assisted with the documentation.

¹ Richard B. Morris and Jonathan Grossman, "The Regulation of Wages in Early Massachusetts," *The New England Quarterly*, September 1938, p. 470.

² *Records of the Company of Massachusetts Bay*, I, pp. 74, 76, 79, 109, 111; *History of Wages in the United States from Colonial Times to 1928*, Bulletin 604 (Bureau of Labor Statistics, 1934), pp. 9-10.

³ *Massachusetts Bay Records*, I, p. 147; John Winthrop, *Journal* (Boston, 1853), I, p. 191.

⁴ *Massachusetts Bay Records*, I, pp. 260, 291.

⁵ Winthrop, *Journal*, II, pp. 25-26.

⁶ Richard B. Morris, *Government and Labor in Early America* (New York, Columbia University Press, 1946). A brilliant and comprehensive work which has two excellent chapters on wage and price regulation during the Colonial and Revolutionary periods, pp. 55-135.

⁷ *The Articles of Association*, October 20, 1774, Record Group 360, National Archives.

⁸ Morris, *Government and Labor*, 93; *Journals of the Continental Congress* (34 vols., Washington, 1904-1937) V, p. 591, VI, pp. 915-16.

⁹ *Acts and Resolves Public and Private, of the Province of Massachusetts Bay*, V, pp. 669-70.

¹⁰ *Acts and Resolves*, pp. 669-73.

¹¹ Morris, *Government and Labor*, pp. 97-100; *Journals of the Continental Congress*, VIII, pp. 80, 81, 88, 124, 125; E. C. Burnett, compiler, *Letters of the Members of the Continental Congress* (8 vols., Washington, 1921-1936), II pp. 227, 233, 251-52; *Familiar Letters of John Adams and His Wife Abigail Adams During the Revolution* (New York, 1876), p. 239.

¹² *Acts and Resolves of Massachusetts Bay*, V, pp. 583-89; *Boston Gazette*, Feb. 3, 1777; (Boston) *Continental Journal and Weekly Advertiser*, Feb. 6, 1777. The wage-price relationship revealed by the Massachusetts law throws light on the question of real wages. Adam Smith in *The Wealth of Nations* observed on the eve of the Revolution that "wages . . . are much higher in North America than in any part of England." A rough calculation shows that in Massachusetts it took about a day's work to buy five pounds of butter, and 2 days' work to pay for a pair of shoes. Real wages in Revolutionary Massachusetts, though princely remuneration when compared with wages of European workers, were pitifully low by modern standards.

¹³ *Continental Journal*, Feb. 6, 13, 1777; *Boston Gazette*, Feb. 3, 1777; (Boston) *The Independent Chronicle and Independent Advertiser*, Feb. 13, 1777; (Report of the Record Commissioners of Boston, Boston, 1876, pp. 260, 261). *Boston Town Records*, 1771-1777.

¹⁴ *Continental Journal*, Feb. 27, Mar. 6, 1777.

¹⁵ *Acts and Resolves of Massachusetts Bay*, V, pp. 642-47, 673, 723-24; *Boston Gazette*, Apr. 28, June 16, 23, 1777.

¹⁶ Morris, *Government and Labor*, p. 102.

¹⁷ *Acts and Resolves of Massachusetts Bay*, V, pp. 812-13.

¹⁸ *Acts and Resolves of Massachusetts Bay*, V, pp. 1012-17; (Worcester) *Massachusetts Spy*, Or, *American Oracle of Liberty*, Mar. 26, 1778.

¹⁹ *Papers of the Continental Congress*, 1774-89, Item 19, VI, 123, Record Group 360, National Archives; *Journals of the Continental Congress*, XI, p. 569.

²⁰ *Continental Journal*, Dec. 11, 1777; *Boston Gazette*, Dec. 8, 1777, Oct. 25, 1779.

²¹ Christopher Ward, *The War of the Revolution* (New York, 1952), II, p. 595.

²² *Acts and Resolves of Massachusetts Bay* V. 1243; (Plymouth, Mass.). *Records*, II, 375-381; *Boston Gazette*, June 21, Aug. 2, 16, Sept. 6, 1779; *Independent Chronicle*, June 10, 24, July 29, Aug. 19, Sept. 9, 16, 30, 1779. *Continental Journal*, Feb. 25, July 1, Aug. 5, 19, Sept. 9, 1779; *Evening Post*, July 31, 1779; *Massachusetts Spy*, July 1, 8, Aug. 5, 19, 26, 1779.

²³ Morris, *Government and Labor*, pp. 109-12; *Journals of the Continental Congress*, XV, pp. 1289-90; *Acts and Resolves of Massachusetts Bay*, V, pp. 1258, 1261-62; *Boston Gazette*, Dec. 13, 1779; *Independent Chronicle*, Aug. 19, Dec. 10, 1779; *Continental Journal*, Dec. 10, 1779.

²⁴ *Acts and Resolves of Massachusetts Bay*, V, pp. 583-89.

²⁵ Morris, *Government and Labor*, p. 121.

²⁶ Morris, *Government and Labor*, p. 123.

²⁷ Philip Foner, *History of the Labor Movement in the United States* (New York, International Publishers, 1947), I, 45.

²⁸ *Boston Gazette*, Oct. 4, 1779.

²⁹ *Boston Gazette*, Feb. 3, 1777, Aug. 9, 1779; *Independent Chronicle*, Apr. 24, 1777; *Familiar Letters of John Adams and his Wife Abigail*, pp. 262, 263, 286-87.

³⁰ *The Articles of Association*, Oct. 20, 1774, Record Group 360, National Archives.

³¹ See, for example, (Newport, R.I.) *Newport Mercury*, Nov. 28, 1774, June 13, 1776.

³² *Watertown (Mass.) Records*, IV, pt. 6, p. 204.

³³ *Boston Gazette*, Feb. 3, 1777, Aug. 9, 1779; *Independent Chronicle*, Apr. 24, 1777; *Continental Journal*, Feb. 6, May 2, 1777.

³⁴ *Boston Gazette*, Sept. 27, 1779; *Continental Journal*, Sept. 23, 1779, Oct. 7, 1779; (Providence, R.I.) *The American Journal and General Advertiser*, Aug. 14, 1779.

³⁵ *Independent Chronicle*, Oct. 9, 1777, Sept. 2, 23, Nov. 5, 1779; *Continental Journal*, June 23, Oct. 2, 9, 1777, Sept. 9, 1779; *Boston Gazette*, Apr. 21, 28, 1777, Aug. 30, Sept. 6, 1779.

³⁶ *Acts and Resolves of Massachusetts Bay*, V, pp. 1263-65.

³⁷ *The Continental Journal*, Feb. 6, 1777; Ltr., John Cox and Chas. Pettit to His Excellency The President of Congress, July 3, 1779, Item 78, Miscellaneous Letters Addressed to Congress, Vol. 5, pp. 359-66, Record Group 360, National Archives; Morris, *Government and Labor*, pp. 114-16.

³⁸ Milton Friedman, "What Price Guideposts", in George P. Shultz and Robert Z. Aliber, *Guidelines, Informal Controls, and the Market Place* (Chicago, University of Chicago Press, 1966), p. 39.

³⁹ Pelatiah Webster, "Essay on Free Trade and Finance," July 1779, pp. 11-18, 128-38, *Political Essays on the Nature and Operation of Money, Public Finances, and Other Subjects* (Philadelphia, 1791); Morris, *Government and Labor*, p. 116.

⁴⁰ *Massachusetts Spy*, July 29, Aug. 5, 12, 1779. 1779.

⁴¹ Ward, *Revolution*, II, 866.

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PROFESSOR DUNLOP'S UNSEEN WAR ON INFLATION

WITHOUT DRUMS OR DRAMA, HE HAS BEEN MAKING GOOD USE OF PERSUASION AND ACCOMMODATION DOWN AT THE COST OF LIVING COUNCIL

(By Gurney Breckenfeld)

As the nation has begun to learn from painful experience, economic controls sometimes do more harm than good. In demand-pull inflation—the kind we've been afflicted with in 1973—any effort to impose controls on prices is likely to lead to shortages and distortions, and a freeze is sure to do so. To achieve even moderate success in Phase Four, the government will have to buttress the announced rules with:

Fiscal and monetary restraint to hold down the growth of demand.

Effective efforts to eliminate supply bottlenecks.

A lot of patient, knowledgeable detail work to apply the wage and price controls to the actual economy—those involved, angular real-life cases that so rarely quite fit any simple rules.

Fortunately, the government—better late than never—has been applying fiscal and monetary brakes with considerable force. And the outlook is promising on the other fronts, too, thanks largely to John T. Dunlop, fifty-nine, director of the Cost of Living Council.

FOGGED WITH MISUNDERSTANDING

A Harvard economics professor, Dunlop took charge of price-wage controls last January. Since then, he has waged an unseen war on inflation, a war that has accomplished more than meets the eye. Prodding a frequently unresponsive federal bureaucracy, he has helped bestir the government to extraordinary efforts to increase supplies of food and raw commodities. In public and private, he has tussled with Congress and tried to prevent the passage of misguided legislation. And he has painstakingly conducted a remarkably effective campaign to restrain union wage settlements.

Public perception of Dunlop's work has been fogged with misunderstanding. His efforts to cope with inflation do not involve dramatic thrusts or ringing pronouncements. Instead he deals mainly with details, often intricate and sometimes seemingly petty. Much of what he does goes on behind the scenes. He likes to operate by persuasion and accommodation rather than by dictate.

Until very recently, moreover, Dunlop contributed to misunderstanding of his efforts by avoiding regular contact with the press. Frustrated reporters dubbed him "the invisible man," and the press comments on his work included a large amount of sniping. For his part, Dunlop has a point when he complains that "the press is tuned to the noise, the klieg lights, and the posturing. On that wavelength, you don't get any airing of real issues and problems."

"HE'S A LONG-BALL HITTER"

Dunlop's utterances are often so pungent that they mask the underlying profundity. His curiously high-pitched voice often rises almost to falsetto as he emphasizes a point. "At first he comes on as a funny old man," says one admiring official at the Cost of Living Council, "but pretty soon you realize that he's a long-ball hitter of the first order."

One of Dunlop's virtues as a price and wage controller is that he has no great liking for controls and no illusions about their efficacy. "When you have demand-pull inflation," he said shortly before the end of Phase Three, "there isn't much you can do with controls." He allows that they can be useful as a temporary supplement to other actions, but believes that even here successful use of controls requires the consent of the victims.

That consent, he holds, is most quickly achieved by back-room bargaining where participants feel free to speak candidly because their words will not leak to the press and embarrass them. Ralph Nader has sued the COLC for refusing to open the meetings of its labor-management advisory committee to the public. Dunlop's reaction: "I'm dumfounded that anybody would think I can get anything done that way."

In getting things done, Dunlop toils so endlessly that some acquaintances refer to him as "a workaholic." About 7:45 a.m. he walks from his apartment to the White House for a daily conference with four or five other top members of the Nixon economic team. The topmost, of course is, Secretary of the Treasury George Shultz, who as chairman of the COLC is Dunlop's boss.

AFTER EIGHT, IN A BAR

After the meeting, a chauffeur whisks Dunlop across town to the COLC quarters in a commercial office building on M Street. There he works away until 7:00 or 8:00 p.m. Then comes a business dinner. Half of Dunlop's job is talking with people, and he enjoys it, but he observes with a grin that "after eight o'clock I try to do it in a bar." Associates insist that he is at his most effective in that setting, nursing a scotch mist and listening, expounding, or cajoling.

Combining stamina, stubbornness, and patience, Dunlop has mastered the art of talking other people into seeing things his way. William J. Usery, director of the Federal Mediation and Conciliation Service, has watched Dunlop develop this technique through almost two decades of labor relations. "He has the knack of coming up with an idea," says Usery. "By the time he's through, it's one of the other parties' ideas."

Labor leaders regard Dunlop with about as much admiration as they could be expected to muster for any wage controller. Following Dunlop to a podium in San Francisco not long ago, Lane Kirkland, secretary-treasurer of the A.F.L.-C.I.O., predicted that "I and my colleagues will be raising hell with him and jumping on his head." But Kirkland added: "He is one of the great dispassionate public servants without whom our system would not work as well."

Jerry Wurf, president of the American Federation of State, County and Municipal Employees, lauds Dunlop's "great manipulative talent," but says that he "is never burdened by any doubts of his own wisdom and his own strong views, regardless of whether they have any relation to the problem at hand." On balance, Leonard Woodcock, president of the United Auto Workers, probably reflects the prevailing viewpoint of organized labor when he says: "As long as we have controls, I would rather have Dr. Dunlop in charge than anyone else."

REFORMS FOR "INFLATION-PRONE" SECTORS

In his day-to-day attention to details of wages and prices, Dunlop keeps a long-range objective in mind. He wants to use the leverage of controls to promote permanent "structural reforms," to tinker with institutional arrangements that now make some sectors of the economy unduly "inflation-prone," as he puts it. The payoff may be three to five years away, he admits, but "in six months you can get started."

A major arena of Dunlop's efforts at structural reform is the construction industry, which could certainly stand some reforming. Dunlop has begun to reshape a fragmented pattern of local bargaining by persuading unions and contractors to negotiate agreements covering larger geographic areas. It's also part of his operating theory that national labor leaders are generally more responsive both to the country's economic needs and labor's long-term interests than either local union bosses or the rank and file. By setting up labor-management review boards in the construction industry, he has brought the moderating influence of union presidents to bear against unnecessary strikes and outsize wage increases.

Dunlop found that the federal government was obstructing its own objectives by neglecting to use its power as a big buyer and seller to learn against rising prices. "We talk a lot about free enterprise," he says, "but the government is up to its neck in business, and its action are utterly uncoordinated."

Moving into that managerial vacuum, Dunlop helped to persuade the President to speed up government sales of stockpiled rubber, and such metals as aluminum and antimony. As the price of steel scrap soared, he helped to get the Maritime Administration to double its sales of scrap from obsolete ships.

In a notably successful campaign, Dunlop helped to reverse the precipitous climb in lumber prices. Over a two-month span after the start of Phase Three, the price of kiln-dried Douglas-fir two-by-fours rose 25 percent and that of interior sanded plywood just about doubled. Builders complained that higher lumber costs had raised the price of an average new house by as much as \$1,500 in six months.

GOVERNMENT AT CROSS PURPOSES

There were several reasons for the sudden surge. For one thing, log exports, mainly to Japan, rose by 27 percent in 1972. And freight-car shortages, a chronic problem much aggravated by the grain shipments to the Soviet Union, were preventing some sawmills from shipping their lumber to customers. Nudged by the COLC, U.S. trade negotiators persuaded the Japanese to cut down their log purchases by 15 percent. And the Department of Transportation's Railroad Administration acted to ease the freight-car shortage by reducing free time in ports and penalizing shippers for detaining equipment.

But a large part of the problem resulted from the government's plodding management of its own lumber resources. Half of the nation's softwood timber inventory stands in the national forests. But precisely at the time when the Department of Housing and Urban Development was dispensing subsidies to spur housing starts to record peaks, the amount of timber sold by the U.S. Forest Service declined 10 percent in two years.

A big reason was that the Office of Management and Budget, in its overdue effort to cut the federal budget, had forced the Forest Service to lay off 10 percent of its force, some 2,000 people. The Forest Service undertook to make the cutback by attrition, and as a result the ranks of young foresters and engineers, the men who mark trees and lay out roads to prepare forests for logging, dwindled to the point where the service could no longer reach its own goals for timber sales.

Before Dunlop stepped into the situation, the Forest Service and OMB had reached an impasse. The foresters argued that to sell more timber they needed more men and money, but the budget experts contended that the Forest Service wasn't using effectively what it had. So Dunlop and Agriculture Secretary Earl L. Butz, in whose domain the Forest Service illogically lies, appointed a task force to figure out some answers.

A WELL-INFORMED ARM-TWISTER

To head the six-man task force, they chose John W. Larson, a former assistant secretary of the Interior, who was then serving as Butz's chief of staff in his role (since abolished) as counselor to the President for natural resources. Using figures supplied by foresters, Larson laid out a detailed schedule (it fills three huge looseleaf notebooks) showing precisely how much money and manpower would have to be assigned in each national forest to each of some twenty steps necessary to prepare more timber for sale on a tight timetable. That took about a month. Then, says Larson, "we spent thirty days twisting arms in the bureaucracy."

The upshot was that OMB gave the Forest Service enough money to hire 450 more foresters and engineers. With that, the service promised to step up its timber sales by 9 percent in 1973. Responding to the prospect of rising supplies, sawmill operators increased their production even though housing starts, their main source of demand, had dropped substantially. From a peak in early April, softwood lumber prices have fallen by 25 percent and plywood even further.

"We could have done this two years ago," Larson says, "and probably taken the real peak out of the rise in lumber prices. The trouble is nobody in government has this sort of thing as his main job." Impressed by Larson's performance, Dunlop recruited him as one of his chief aides for planning Phase Four.

ALMOST A REVOLUTION

In contrast, Dunlop's resourceful battle to slow the rise of food prices by pushing more farm products onto the market has mainly yielded a bumper crop of frustrations. He found his path strewn with familiar obstacles: congressional myopia, farm lobbyists, and bureaucratic inertia. "Every day of every week," he fumes, "we fight some battle with these guys to get more food, more production." As he sees it, "We ought to change our farm policy from thirty years of cutting and restricting output to a policy of increasing supplies."

In Administration deliberations during Phase Three, Dunlop persuasively argued for precisely such a switch. And by COLC's count, the government did

make a dozen major moves to increase farm output or bring more food into the domestic marketplace. George Shultz contends that together these moves amount "almost to a revolution in agricultural policy."

The Department of Agriculture lifted planting restrictions on nearly all the land "set aside" from production in 1972—43 million acres—in hopes that farmers would grow more grain and soybeans. The government also dropped export subsidies for farm products and started to empty its bins of stored grains and other foodstuffs. Despite the opposition of domestic dairymen, the Administration lifted import quotas on cheese and nonfat dry milk. Summing up the search for new ways to bolster farm output, Dawson Abalt, a COLC economist and agricultural expert, uses a nonfarm metaphor: "We're looking under every rock we can find."

In trying to restrain industrial prices, Dunlop called in the top management of industry to be his counselors. By the middle of the year, fifty-two chief executives of big companies in key industries—lumber, oil, machine tools, paper, textiles, nonferrous metals, and metal containers, among others—had come to COLC's Washington offices to share their insights with the controllers. "I'm impressed by the candor," says Dunlop, who personally sat in on nearly half the sessions. "We get a firsthand view of problems, capacity, investment decisions and the reasons for them. After all, price decisions are not made in a vacuum."

Dunlop is convinced that effective regulation requires close acquaintance with the complex actualities of business. He felt that Phase Two's Price Commission and Pay Board, whose staffs he inherited along with that of the Cost of Living Council, were overloaded with theoreticians and accountants. As he puts it, "They were experts at issuing glorious pieces of paper—regulations—but they didn't have the foggiest notion of what was going on in the real world. To have a sense of discretion about wages, for instance, you've got to know what the real pressures and problems are. To put discretion in the hands of people who have no real knowledge of the subject is ridiculous. If a bunch of labor-management people come in to talk to a bureaucrat, they know in about thirty seconds whether he understands what he's doing or not."

THAT "DUNLOP RUBBER STANDARD"

When it comes to wage controls, Dunlop has demonstrated over his long career as a labor mediator that he does know what he's doing. At the beginning of the year, fears were widespread that 1973 would bring a big wave of strikes and hefty pay increases. But with more than half the year gone by, contract talks have been conspicuously peaceful, wage increases have been generally moderate, and no breakaway settlements have materially punctured the government's guidelines.

The tranquillity is not all Dunlop's handiwork to be sure. In numerous ways, collective bargaining has begun to swing from confrontation to accommodation, and occasionally even voluntary arbitration. Dunlop relies regularly on federal mediators. He is not loath to intervene personally in critical negotiations, but he moves quietly before the conflict flares into the public eye. "You cannot handle wage stabilization without handling dispute settlement," he has said. "I call up my friends on one side or the other and find out what's wrong."

A much misunderstood principle that has unquestionably contributed to good behavior by unions is the so-called "Dunlop rubber standard" for wage increases. The label was applied to the COLC wage guidelines by Washington wits after Dunlop confused newsmen at a White House briefing early in Phase Three. At one point he remarked that "the wage and price standards" of Phase Two "continue in effect," including the Pay Board's 5.5 percent guideline for average pay increases. But he went on to say he agreed with the statement by COLC's labor-management advisory committee that "no single standard of wage settlements can be equally applicable at one time" to every union.

THE REPORTERS GOT IT WRONG

However contradictory that may sound to laymen, it makes perfectly good sense to a labor expert. For decades, wage-control programs have normally allowed a pattern of dispersion, reflecting such variables as fringe benefits, work rules, local labor shortages, and adjustments of inequities. But many reporters seized on what Dunlop said as evidence that the administration was pulling a trick play with its guidelines. The COLC hastily called another briefing to try to clear things up, but the haze persisted.

Confusion was still evident in June, after Dunlop made a speech at a meeting of the Institute of Collective Bargaining and Group Relations in San Francisco. Reiterating his theme, Dunlop said: "A single number is not a wage policy, whether it is 3.2, or 5.5, or 6.2. It's an outrage even to think so." Next day, missing the point completely, the San Francisco *Examiner* said Dunlop had hinted that the Cost of Living Council might soon adopt a higher standard for wage increases.

Over the past two years the Dunlop rubber standard has been applied with notable success in curbing runaway pay increases in construction. In March, 1971, President Nixon named Dunlop chairman of the Construction Industry Stabilization Committee (a job that he finally relinquished in June of this year). Before that, the nineteen building-trades unions had been winning raises averaging 13.8 percent a year. Dunlop refused to use any quick clamps, even after the President froze wages and prices in August, 1971. Later, when the Pay Board tried to order Dunlop to conform to its rigid rules, he refused.

Dunlop's pragmatism was so flexible that few outsiders could see principle or logic in it, but to him it all made sense. Though he sometimes allowed the best-paid craft in the area no increase at all, he let others catch up in order to restore the traditional local balance between trades, sometimes with increases amounting to as much as 17 percent a year. Gradually, both the size of pay gains and the frequency of strikes declined. Last year building-trades wages rose only 5.9 percent, slightly less than the average for all contracts under the Pay Board's purview. So far this year, wage settlements in the construction industry have continued to move downward in percentage terms.

For this achievement, the International Association of Wall and Ceiling Contractors recently awarded Dunlop a metal plaque as "Man of the Year in Construction." Dunlop received it with a chuckle. "I'll be glad to put it on my wall," he said, "right next to the letter they wrote to the President two years ago demanding that I be fired."

Perhaps the most ambitious of Dunlop's aims is to use his wage-control powers to spur enduring improvements in labor-management relations. He is currently trying to do this in the supermarket industry, the only segment of food retailing where unions have a substantial foothold. Its labor-management relations, Dunlop says, are "in more than a mess."

Stores deal separately with butchers, clerks, and teamster locals, and wage rates tend to leapfrog from one chain to another. Moreover, supermarket chains in a particular area do not always bargain with the same locals, so pay and fringe benefits often differ in the same town for employees of different chains. Featherbedding rules abound: no conveyor belts in trucks, price marking done only in stores, no stocking of shelves by vendors.

A WAY TO SETTLE A STRIKE

One result of all this is that over the past decade store wages have increased much faster than supermarket sales per man-hour. Naturally that disparity has helped to force prices up. But most grocery chains run on such paper-thin margins that they are afraid to risk a strike.

Dunlop put the challenge of dealing with such problems up to the food industry's tripartite wage-and-salary committee, organized by the COLC. Robert O. Aders, board chairman of Kroger Co. and a member of the committee, took the initiative by calling on both management and unions to set up permanent national machinery to mend their relations, though not, he stressed, to do any bargaining. Dunlop is confident that the outcome will be "new long-term arrangements in an industry that desperately needs them."

In May, 50,000 supermarket workers in Southern California were poised to strike for a 16.5 percent pay increase. Federal mediators brought union and management negotiators to Washington where they talked with the tripartite committee. "We told them we weren't going to settle the dispute for them," recalls one member, "but that we sure as hell expected them to settle the row responsibly themselves."

The union postponed its walkout only hours before the strike deadline, and the two sides hired labor consultant Wayne Horvitz, a public member of the tripartite panel, as a private fact finder. A few weeks later, he recommended a 6.5 percent pay raise, and after an intricate series of maneuvers, union members ratified the arrangement by a narrow margin. Sources close to the negotiations say that Dunlop's behind-the-scenes skills were crucial to the peaceful settlement.

THE TEACHER AND THE MEDIATOR

Many years of training and experience, both on and off university campuses, have helped to prepare Dunlop for the complex job he now holds. The eldest son of a Presbyterian clergyman, he earned his way through the University of California at Berkeley partly by cooking for a professor and partly by managing the family pear orchard. He came to Harvard as a teaching fellow in 1938, and there he stayed, in time becoming chairman of the economics department and then dean of the Faculty of Arts and Sciences.

For decades, Dunlop pursued a double career as an academician and a labor mediator, spending at least one day a week in Washington. During World War II and again during the Korean war he served as a federal wage stabilizer. Over the years he has probably acquired more practice settling construction labor disputes than anybody else in the country.

These days, Dunlop commutes weekends to his ranch-style home in the Boston suburb of Belmont. His wife Dorothy and the youngest of their three children have remained there. Dunlop likes to read, walk in the Belmont woods, or, he says, "just sit in my study and get a perspective on things." There are also what he calls "leftover chores" from Harvard to keep him busy. As Dorothy Dunlop says, "he never stops working."

Over the course of his career, Dunlop has developed a strong aversion to federal economic controls. "Government," he says, "can never outsmart private parties, never recruit the people, never acquire enough oomph, knowledge, and capacity to run the U.S. economy."

He nonetheless accepted the wage-price-control job because it provided a challenging opportunity to put a life-time of learning into practice. For nearly thirty-five years his teaching, writing, and mediating had focused on such issues as incomes policy, wages and prices, productivity, and structural changes in labor and product markets. And he was well aware that governments had often stumbled in trying to apply economics to real-life economies. "No Western society knows how to arrange an optimal balance between economic stability, high employment, and labor peace," he says. "We want all these goodies, but we don't know how to have them."

Now, looking back on the disappointing results of Phase Three in slowing down price increases, Dunlop concedes that the balance remains elusive. It still fascinates him that the Administration, like most private economists, failed to anticipate this year's great leap in farm prices. While Phase Three was being planned last November, Agriculture Department technicians predicted a rise of less than 2 percent in retail food prices for the first half of 1973. Instead, they went up roughly 10 percent.

But Dunlop has a good case when he maintains that Phase Three was not responsible for most of the price increases that occurred while it was in force. The program was designed for a set of economic conditions that vanished almost as soon as it went into effect.

WHY THE STICK STAYED IN THE CLOSET

Dunlop does not argue with critics who contend that in announcing Phase Three the Administration fumbled by labeling it "voluntary." Labor leaders, journalists, and many businessmen leaped to the conclusion that price enforcement would be lax. Though Nixon, Shultz, and others made a point of talking about "the stick in the closet" that would be wielded against price offenders, it was not until June that the COLC challenged a price increase under the Phase Three rules.

One reason for the delay was that it took the council until May 7 to issue the form (CLC-2) on which big companies were required to report and justify price increases. The forms covering the first quarter of 1973 were not even due to be filed until June 21. Factional strife inside the COLC contributed to the delay. Carry-over staffers from the abolished Price Commission wanted to require companies to justify all price increases by profit margins on each product—a proposal that was overruled after businessmen protested that this might lead to leaks of vital competitive secrets.

Ironically, when the returns were examined last month, they showed that price violations had been scarce, just as Dunlop has insisted all along. Only three companies out of 674 appeared to have raised prices without cost justification; another thirteen appeared to have violated the regulations on profit margins.

In looking back on Phase Three, Dunlop concedes that "maybe I should have

been out doing a big public-relations job." Though he adds, "That's not my particular dish," it is noteworthy that in recent weeks Dunlop and other top COLC officials have begun seeing reporters regularly, and press criticism of the price-wage program has softened.

A FREEZE TO FORESTALL A FREEZE

George Shultz, Dunlop's boss, also defends Phase Three. "In the areas where Phase Three could do something," he said not long ago, "it has been pretty effective. We've had industrial peace. Our labor-cost posture is beautiful. Prices? We worked on the auto companies and other big companies at the start of Phase Three. They've been extremely responsible. Maybe it would have been better if we'd encouraged them to make outlandish increases and then had a confrontation. What the country loves, and what Washington loves, is knocking heads off. My approach and John's is to go about our task in an orderly way. We've got to figure out how to be more flamboyant."

Both Shultz and Dunlop counseled President Nixon against reimposing price ceilings. So did Herb Stein and even presidential adviser John Connally. Shortly before the end of Phase Three, Dunlop said to a reporter that advocates of a freeze were "as crazy as bedbugs."

Only presidential counselor Melvin Laird favored price ceilings, on political grounds. When the President began studying new moves against inflation in early June, the other four suggested what Dunlop calls "a more moderate program," including more mandatory controls over some sectors of the economy. The presidential advisers discarded the idea of asking for a tax increase or other fiscal measures. They figured that Congress would wrangle over the legislation too long. They also feared that Congress might load a tax bill with unwelcome provisions.

Nixon rejected their first set of recommendations and asked for stronger proposals. When he got them, he made his own selection. He chose a price freeze partly to try to halt inflationary expectations and partly to forestall threatened action by Congress. The Senate seemed about to vote for a ninety-day freeze covering not only prices and wages but also rents, profits, and consumer interest rates. It would be better to shape the freeze himself, the President reasoned, than to be faced with a freeze he considered too severe.

Having placed wholesale and retail price ceilings on food, the Administration had to impose export controls to keep excessive quantities of U.S. farm products from moving abroad. Until the autumn harvest, says Dunlop, "we really don't have any other measure to deal with food prices." Now that the controls are on, it would not surprise Dunlop if they persist through the 1974 crop year.

"In the years ahead we have a difficult economic passage," says Dunlop, with academic understatement. "We very much need a period of continued restraint in industrial prices and wages while we work out our agricultural problems." Fortunately, evidence is accumulating that the economy's rate of expansion is slowing. But it will require extraordinarily delicate action on several fronts to keep Phase Four from "fouling up matters unduly," as Shultz puts it.

"PHASE FOUR IS PHASE OUT"

Though the President has demanded stability in gasoline prices, for example, his controllers nevertheless must allow these prices to be high enough to pay for large oil imports. Food prices will undoubtedly have to go up before they level off, in order to give farmers as incentive to expand their output. Some industries operating at capacity, including aluminum, steel, and electric power, must be allowed sufficient price incentives to expand their capacity.

In Dunlop's view, "Phase Four is phase out," because permanent wage-price controls would be "economic suicide." Still, he feels that "the forces for perpetuation of controls are real and significant." As he sees it, getting rid of controls "depends on the determination of the people." That determination has undoubtedly been strengthened by the problem-plagued freeze, and Dunlop is hopeful. "If the country learns a lesson from the freeze," he says, "it won't have been in vain."

[From the New York Times, Oct. 28, 1973]

ADDICTIVE NATURE OF CONTROLS

(By Edward Cowan)

Washington—The Nixon Administration finds itself staring full in the face the proposition that wage-price controls are addictive.

In Administration economic circles, everyone says controls should be ended. Not now, mind you, but as soon as possible.

Why not now? Well, right now the Cost of Living Council is using controls, especially its power to delay price increases, to "stretch out the bulge."

What bulge? Why, the bulge that follows the end of a price freeze—in this case the Presidential freeze that began June 13 and ended in stages between July 18 and Sept. 10.

And when does a bulge end? Officials concede that this is a good question. Indeed, the distinction between a post-freeze bulge and continuing inflation may be entirely semantic.

The Administration's general proposition last summer was that it would dismantle controls this winter or early next year as the pace of the economy slowed and underlying inflationary pressures subsided.

John T. Dunlop, director of the Cost of Living Council, suggested a phased decontrol, starting with those industries least beset by inflationary forces.

Mr. Dunlop took a step in that direction last week by exempting fertilizer from controls as part of a package of moves to increase domestic fertilizer supplies and, ultimately, food supplies.

Development of a phased-decontrol strategy has proceeded slowly, partly because of preoccupation with writing Phase 4 regulations and partly because underlying conditions don't look propitious. Two weeks ago the Secretary of the Treasury, George P. Shultz asked the hundred corporate barons who comprise the Business Council how many of them would raise prices within three weeks if controls were ended.

"A substantial number of hands" were raised, Mr. Shultz reported.

Since the start of Phase 4 for manufacturing on Aug. 12, more than 1,200 large companies have filed price-increase notices covering 3,300 product lines.

The cutback in Middle East oil production and price increases can only add to the considerable upward pressure on oil and gasoline prices. Moreover, Congress seems determined to include in the Alaska pipeline bill an exemption from price controls for "small" oil wells. What the size criterion will be is unresolved.

Food prices, up 21.5 per cent in the 12 months ended Sept. 30, are expected to go on rising, if at a slower rate. This may be a key fact, because if anything is likely to ignite a new round of wage inflation, it is the rising price of food.

Mr. Dunlop said the other day that he opposed wiping out all controls by the turn of the year. He said decontrol by New Year's Day would produce price increases great enough to revive public and Congressional sentiment for controls.

These facts, portents and dangers appear to argue for keeping wage-price controls for at least six more months. It is easier to hang on than to let go.

But six months from now, on April 30, 1974, the legislative authority for controls, the Economic Stabilization Act, is due to expire. It is unlikely that Congress would renew it in a form acceptable to the Administration. It is equally unlikely that the Administration wants the law extended. No Administration position has been hammered out, but Mr. Shultz, Mr. Dunlop and other officials are understood to believe that the act should die.

That does not mean, however, that the Administration will get out of wage-price intervention altogether. Politically that's not wise. The Administration cannot return to complete passivity on the wage-price front without exposing itself to criticism that it is indifferent to the plight of the workingman and the consumer.

That is another of the addictive qualities of controls. Also tempting is the belief that intervention can be useful, if it's the right kind.

So the search for a new approach is on. Mr. Dunlop has spoken informally about a wage-price monitoring unit in the Government. It would search out what Mr. Dunlop regards as the key prices and wages—those that set off an inexorable chain reaction when they rise.

But what to do then? Mr. Dunlop is a great believer in and practioner of selective, backstage intervention. While he knows what he might do, that is an insufficient foundation for a policy that must be declared. Moreover, there is the nagging question of whether high-level cajolery and arm-twisting can be effective if Washington has no reserve authority to intervene.

Arthur F. Burns, the Federal Reserve Board chairman adviser on economic issues, has dusted off an old idea for wage-price intervention that has interested liberal members of Congress.

Mr. Burns would set up a review board. It would have the power to delay increases, inquire into the economic facts, publish findings and make recommendations. This approach has at least one obvious merit: It contemplates an institutionalized approach to wage-price restraint that could be highly visible.

Mr. Burns has suggested that the proposed board be empowered by Congress to intervene only in industries deemed by the board, according to its own criteria, to be lacking effective competition.

Mr. Dunlop's objection is that this approach assigns too much responsibility for inflation to the more concentrated industries (autos, aluminum, oil, steel and computers) and overlooks the trouble that can start elsewhere, most notably in the highly diffused construction industry.

For instance, would a Burns-type board have authority to poke into wages paid to the highly skilled steamfitters, welders and metal workers who will be in great demand to build and expand oil refineries in the next few years?

If not confined to noncompetitive industries, a review board might be able to take up where Phase 4 leaves off.

Meanwhile, no start on industry-by-industry deregulation is likely before December, according to high officials. What begins to emerge, therefore, is the possibility of a sudden, immediate termination of controls time in the first months of 1974. A cold-turkey cure, it might be said.

AMERICAN NURSING HOME ASSOCIATION, PLAINTIFF

v.

COST OF LIVING COUNCIL, ET AL., DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1773-73

ORDER

Upon consideration of the entire record in this action and for the reasons stated in the Court's Memorandum of December 5, 1973, it is by the Court this 5th day of December, 1973,

ORDERED that the Phase IV regulations on institutional providers of health services, as applied to nursing homes be, and the same hereby are, adjudged arbitrary and capricious and in conflict with the mandate of Congress as outlined in Titles XVIII and XIX of the Social Security Act; and it is further

ORDERED that defendants be, and the same hereby are, individually and as members of the Council, their agents, servants, employees, and attorneys, permanently enjoined from implementing or enforcing any of the Phase IV regulations on institutional providers of health services as they affect nursing homes; and it is further

ORDERED that defendants be, and the same hereby are, individually and as members of the Council, their agents, servants, employees, and attorneys, permanently enjoined from interfering with or limiting the amount of cost reimbursement which nursing homes are entitled to receive for services rendered under the Medicare and Medicaid programs.

Judge.

AMERICAN NURSING HOME ASSOCIATION, PLAINTIFF

v.

COST OF LIVING COUNCIL, ET AL., DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1773-73

MEMORANDUM

This cause is before the Court on plaintiff's motion for a preliminary injunction and a declaratory judgment and defendants' motion to dismiss.

I. Background.

Principally, plaintiff seeks to enjoin the implementation and enforcement of 6 C.F.R. § 300.18 of the Cost of Living Council (hereinafter referred to as COLC) regulatory scheme applicable to nursing homes.¹ This regulation generally limits price increases to nursing homes to those which can be justified by cost increases, and then only to the extent that the price increases do not increase aggregate annual revenues of the preceding year by more than six percent.

Plaintiff, the American Nursing Home Association (hereinafter referred to as ANHA) is a nonprofit corporation and the nation's largest nursing home association with 7,000 members representing 500,000 patient beds. The prime objection of ANHA to the COLC regulatory scheme is that it treats all Medicare and Medicaid reimbursement as a price thus prohibiting the homes from receiving any reimbursement under these programs if that reimbursement, albeit approved by State and Federal governments, increases aggregate annual revenues of the preceding year by more than the six percent ceiling allowed by the COLC unless an exception is granted pursuant to 6 C.F.R. § 300.18(c) (2).

A. Medicare

Title XVIII of the Social Security Act, commonly referred to as "Medicare", establishes a Federal health insurance program which, under the strict and careful supervision of the Secretary of Health, Education, and Welfare, provides medical care for the aged. Under Medicare, posthospital extended care is available to an eligible beneficiary in a skilled nursing facility. To participate in this program as a skilled nursing facility, a nursing home must be certified by the state agency, an administrator of the program along with a private organization known as the "fiscal intermediary," as being in compliance with various health, safety, and environmental standards, and have executed a provider agreement with the Secretary of HEW.

¹ Since the evolution of these regulations is rather complicated, the Court will for the sake of clarity briefly describe the authority which is at issue in this suit. Pursuant to section 203 of the Economic Stabilization Act of 1970 (Public Law 91-379, 84 Stat. 799, August 15, 1970), as amended (Public Law 92-210, 85 Stat. 734, December 22, 1971, and Public Law 93-28, 87 Stat. 27, April 30, 1973), the President promulgated Executive Order 11615 which, *inter alia*, established the COLC as the agency with the primary responsibility for administering the Economic Stabilization Program. Under Executive Order 11627 (October 15, 1971) and pursuant to section 203 of the Act, the COLC was continued and given further authority to stabilize prices, rents, wages, and salaries.

On December 29, 1971, the Price Commission issued regulations covering health care providers. These regulations, 6 C.F.R. § 300.18 and § 300.19, are the provisions challenged by the plaintiff in this suit. However, due to the creation of Phase IV it is necessary to further outline the status of these regulations.

By Executive Order 11695, promulgated on January 12, 1973, the President delegated to the Chairman of COLC all powers conferred upon him by the Act, including the power to make the determinations and take the actions required or permitted by the Act.

On January 12, 1973, Part 300 of the Price Commission regulations was superseded by COLC regulation, Part 130. Institutional providers of health services, including plaintiff, however, remained subject to virtually the same mandatory controls provided for in § 300.18 (§ 130.61, Cost of Living Council Regulations, 38 Fed. Reg. 1479, January 12, 1973).

In Phase IV the COLC is continuing the Phase II and III rules (6 C.F.R. §§ 300.18 and 300.19) applicable to institutional and non-institutional providers of health services (38 Fed. Reg. 21978, August 15, 1973), but the rules have been removed from COLC regulation Part 130 and restated in Part 150 without substantive change.

Payments to skilled nursing homes for services under Title XVIII are to be the reasonable cost of such services determined in accordance with 42 U.S.C. §§ 1395f and 1395x(v), as amended by the Social Security amendments of 1972.² In determining reasonable cost of reimbursement it is significant that the government stringently examines the nursing home expenses. Providers of these services are required to prepare cost analysis reports annually on prescribed forms and the "fiscal intermediary" performs a careful examination of financial and statistical records of the nursing homes.³ In addition, to promote the most efficient use of available beds, patient services, and professional staff time, the law requires the nursing home to have a utilization review plan. The utilization plan provides for review by an outside group to assure maintenance of high quality patient care and the effective use of facilities (42 U.S.C. § 1395x(k)).⁴ One final control shows just how comprehensively the government scrutinizes the factors of "reasonable cost." Under the prudent buyer/operator concept, 20 C.F.R. § 405.451, the provider is required to take advantage of discounts, bulk buying, and other group practices which will insure lower costs. If a provider fails to take advantage of these practices, the amount of his allowable cost may be reduced accordingly.⁵

B. Medicaid

"Medicaid," Title XIX of the Social Security Act, is a cooperative Federal-State program which was enacted for the purpose of enabling states to furnish medical assistance for the aged, blind, and disabled, as well as for families with dependent children and other individuals whose economic resources are insufficient to meet the costs of necessary medical services. In order to participate, a state submits to the Secretary of HEW a plan for medical assistance which comports with certain statutory requirements, one of which is to provide skilled nursing home services for eligible beneficiaries.

Federal matching funds are used to finance state plans for medical assistance. Payments under such a plan are disbursed by an appropriate state agency to nursing homes and other providers of medical assistance.

The precise amount of such payments is established by the state, subject only to a ceiling imposed by 42 U.S.C. § 1396a(a)(30), which provides that a state plan must make provision to ensure that payments for medical care and services "are not in excess of reasonable charges consistent with efficiency, economy, and quality of care." In implementing 42 U.S.C. § 1396(a)(30), the Secretary of HEW promulgated regulations establishing that the upper limits on state payments with regard to various types of medical services under Medicaid (45 C.F.R. § 250.30) cannot exceed the reasonable cost reimbursement made by the Secretary to such facilities for comparable medical services under Medicare. (45 C.F.R. § 250.30(b)(3)(ii)).⁶ Section 1396a(a)(27) of 42 United States Code requires that states enter into written agreements with every person or institution providing services under the state plan. Under these agreements the state agrees to pay the provider for skilled nursing home services, and the provider, in accordance with the method of reimbursement contained in the state plan, agrees to accept this as payment in full for the care of the patient. In a number of states, it was found by Congress that many rates were less than the providers' costs for the patient.⁷ To correct this disparity, many states have raised their reimburse-

² Title 42 U.S.C. § 1395f(b), as amended, provides in relevant part:

(b) The amount paid to any provider of services with respect to services for which payment may be made under this part shall, subject to the provisions of section 1395e [42 U.S.C. § 1395e] be—

(1) the lesser of (A) the reasonable cost of such services, as determined under section 1395x(v) [42 U.S.C. § 1395x(v)] or (B) the customary charges with respect to such services. . . .

Title 42 U.S.C. § 1395x(v), as amended, reads as follows:

(v)(1)(A) The reasonable cost of any services shall be the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services, and shall be determined in accordance with regulations establishing the method or methods to be used. . . .

³ Affidavit of Robert J. Myers, Professor of Actuarial Science, Temple University, at 9.

⁴ *Id.* at 9-10. See 20 C.F.R. § 405.1137, Title IX (Medicaid), 42 U.S.C. § 1396a(a)(30).

⁵ *Id.* at 10. See Provider Reimbursement Manual § 2102-1 and § 2103.

⁶ Section 233 of Pub. L. 92-603 (Social Security Amendments of 1972), now provides for accounting periods after December, 1972, that reimbursement for services under Medicaid and Medicare cannot exceed the lesser of reasonable costs determined under Medicare, or the customary charges to the public.

⁷ S. Rep. No. 92-1230, 92nd Cong., 2nd Sess., 287 (1972).

ment rates, but are unable to pass along these increases due to COLC regulations at issue in this case.⁸

II. Motion to Dismiss.

Before the Court addresses plaintiff's prayer for a preliminary injunction and declaratory judgment, it is appropriate first to examine defendants' argument that for various reasons this Court lacks jurisdiction to grant the relief requested.

Defendants' first contention in this regard is that plaintiff has failed to present a justiciable controversy between the parties before the Court. Citing the classic case of *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227 (1937), defendants argue that this controversy is not sufficiently definite and concrete to be decided through a decree of a conclusive character. The basis of this argument is that plaintiff represents 7,000 individual nursing homes of different sizes, financial conditions, and different degrees of operational effectiveness and participation in Medicare and Medicaid. Due to this varied standing of each home vis-a-vis the COLC regulations, defendants assert that this Court cannot adequately define the legal question for determination.

The Court disagrees with this reasoning. First, plaintiff seeks a declaratory judgment that the entire scheme of regulation is arbitrary and capricious as well as in conflict with Congress' clear direction as related to reimbursement of nursing homes for expenditures under Medicare and Medicaid. There is more than adequate documentation in the record to show that this scheme will have a generally detrimental effect on the growth of the entire nursing home industry. This fact is admitted in an option paper prepared by defendants' own staff where it is stated:

If a nursing home is viewed as a less expensive alternative to acute care institutionalization and is therefore, to be encouraged, the impact of the Economic Stabilization on the growth of this section thus far would appear to be deleterious.⁹

Defendants' reliance on *National Education Association of the United States v. Cost of Living Council*, Civ. Action No. 1946-71 (D.C.D.C., December 7, 1971), is misplaced. In that case the Court was called upon to render an opinion as to whether certain classes of teachers' contracts, with an infinite variety of dissimilarities, fell within the Economic Stabilization Regulation No. 1, 36 Fed. Reg. 16515. This Court, on the other hand, is principally asked only to review the regulation in light of its contradiction of the Social Security Act mandate in connection with Medicare and Medicaid and its effect generally on the nursing home industry for which there is substantial documentation. Therefore, the Court can adequately rule on this substantive question.

Defendants' second argument for dismissal is that administrative remedies have not been exhausted by plaintiff's individual nursing homes. Significantly, however, plaintiff was provided under 6 C.F.R. § 155.41 *et seq.*, 38 Fed. Reg. 21985 (Aug. 15, 1973) with the right to seek an industry exemption from these regulations. Plaintiff availed itself of this opportunity on March 30, 1973, by filing for such an exemption under the then existing Phase III regulations.¹⁰ To date, this request is undecided. It appears to this Court that defendants' argument is inherently inconsistent when it argues on the one hand that plaintiff can avail itself of industry exemption and on the other, that each home must exhaust its administrative remedies. Perhaps more significant is the fact that plaintiff is calling upon this Court to declare this regulatory scheme in conflict with the dictates of Congress as reflected in the Social Security Act. This Court can interpret and rule on this conflict between regulation and statute as cogently as the agency and therefore the Court does not feel constrained to dismiss the complaint for failure to exhaust administrative remedies. If this were a matter where agency expertise was required or the plaintiff was trying to

⁸ Affidavit of James J. Hlinker, Deputy Commissioner of Minnesota Department of Public Welfare, September 11, 1973, at 5. See also Affidavit of John E. Richard, Vice President of the Oregon Health Care Association. In Oregon the COLC refused to allow Oregon more than 7.6% of a 14.4% rate increase passed by the Oregon legislature.

⁹ Memorandum for Members of the Ad Hoc Committee from Executive Director, Health, August 21, 1973, at 2 (hereinafter referred to as COLC Option Paper).

¹⁰ Although it is not necessary to directly rule that defendants' inaction on plaintiff's application for industry exemption is in fact a denial, courts have looked unfavorably in the past on agencies which delay for undue periods of time in decision-making and subsequently raise exhaustion of administrative remedies in court as a defense. *Environmental Defense Fund, Inc. v. Hardin*, 138 U.S. App. D.C. 391, 397, 428 F. 2d 1093, 1099 (1970); *Derrig Milliken v. Johnston*, 295 F. 2d 856, 867-68 (4th Cir. 1961).

short-circuit the administrative process and an administrative record would be of benefit, the Court would hold differently. See *City of New York v. New York Telephone Company*, 468 F.2d 1401 (T.E.C.A. 1972); see also *McKart v. United States*, 395 U.S. 185 (1969).

Defendants' third argument in moving to dismiss the complaint is that § 211 (d) (2) of the Economic Stabilization Act prohibits this Court from granting plaintiff injunctive relief. This section provides that :

A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it.

Defendants contend that the plaintiff ANHA is not a "party" to this litigation and therefore should be denied injunctive relief.¹¹ The Court understands that the legislative purpose of this judicial review provision included the recognition by Congress of the need for speed and consistency of decisions in cases arising under the Economic Stabilization Act and the avoidance of any breaks or stays in the operation of the stabilization program.¹² This Court cannot so narrowly interpret the meaning of "party" as to foreclose an association such as plaintiff from seeking injunctive relief. Clearly, plaintiff is an aggrieved "party" and it has every right to seek injunctive relief in this action.¹³

III. Declaratory and Injunctive Relief.

Plaintiff has prayed for preliminary and injunctive relief as well as a declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202. In this regard, plaintiff asserts that these Phase IV regulations on institutional providers of health services are arbitrary and capricious as applied to nursing homes and in violation of the Fifth Amendment to the United States Constitution, the Economic Stabilization Act of 1970, as amended, and Titles XVIII and XIX of the Social Security Act.

Although the parties have had oral argument only as to the questions involving the motion to dismiss and the preliminary injunction, the Court feels that the merits have been argued with sufficient particularity in both the papers and in open Court for the case to be decided here on its merits.

Plaintiff's most persuasive argument for this Court permanently enjoining the application of these regulations is that they so clearly conflict with the cost reimbursement scheme devised by Congress under Titles XVIII and XIX of the Social Security Act. The Court is well aware that the Cost of Living Council has been given great latitude and their regulations should be given great deference by any court upon review. *United States v. Lieb*, 462 F.2d 1161, 1166 (T.E.C.A. 1972). It could even be argued that Congress in passing the Economic Stabilization Act understood that for the good of the nation certain statutes passed by Congress may be subject to different interpretation in light of the COLC mandate to check inflation. But this Court is convinced that Congress did not intend a scheme of reimbursement so strictly controlled by audit and governmental review as is inherent in Medicare and Medicaid to be partially set aside by COLC regulations that at best have a questionable basis in fact for checking inflation.

It is evident that the costs of nursing home care have not even kept pace with the general cost of living index. Again, it is appropriate to quote from the COLC's own staff study :

Nursing home care aggregate expenditures are very minor in proportion to other health sectors. The grouping of health care industries (hospitals and nursing homes) into one category, and applying one regulatory limit for all, discriminates against those institutions that have contributed the least to the inflationary situation. This is evident when you consider that 60 percent of all public and 30 percent of all private expenditures in fiscal 1970 went for hospital care, while only 9 percent of all public and 3 percent of all private

¹¹ The sister provision of § 211 (d) (2) is § 211 (e) (i), which states :

Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of title, title or any regulation or order thereunder, shall be granted by any district court of the United States or any judge thereof.

¹² Senate Report No. 92-507, 92nd Cong., 1st Sess., 10-12 (1971).

¹³ See *Jennings v. Connolly*, 347 F. Supp. 409, 418 (D.D.C. 1972) (injunction granted to a union challenging COLC regulations); *Retail Clerks International Association v. Shultz*, 352 F. Supp. 480 (D.D.C. 1972) (injunction denied to union challenging COLC regulations but court did not deny its jurisdiction to grant such relief). See, eg., *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

expenditures went for nursing home care. (These figures are from the Department of Health, Education, and Welfare.)

The cost of nursing home care has not kept pace with the cost of living index. The cost of living has risen more rapidly than the cost of nursing home care. The spread has even widened since 1969, and the nursing home industry is below the national cost of living increases.

* * * * * *

Although no national price indexes (i.e., CPI) exist for nursing homes, Medicare data shows that the inflationary impacts of long-term and convalescent care facilities has been significantly smaller than for hospitals. The average cost per claim for inpatient hospital care under Medicare has increased from \$508 in 1966-67 to \$840 in 1972. That is an increase of 65 percent (11.2% per year compounded). During the same time the average cost per claim for care in an extended care facility increased by \$89 from \$307 to \$396 or approximately 29 percent (5.25% per year compounded). For the above reason alone it is probably invalid to control nursing homes and hospitals with the same set of regulations. From the above statistics it might be argued too that a good case exists for decontrolling nursing homes altogether.¹⁴

In addition, the record is replete with much information showing the drastic consequences of the COLC policy as to cost reimbursement. Robert J. Myers, a Professor of Actuarial Science at Temple University and a 36-year employee of the Social Security Administration, has stated with sufficient supporting rationale that:

The Cost of Living Council's continued restrictions on allowing nursing homes to fully recover reimbursement to which they are entitled under Medicare and Medicaid for the costs of services which they provide, will prevent any upgrading in the quality of care in these facilities and eventually result in a reduction in the quality of care, all of which will directly affect the well being of the patients in these facilities.¹⁵

The Court also notes that plaintiff through these regulations has been deprived of a dollar-for-dollar pass through as to increases in costs of such items as safety and health improvements required by statute as well as food costs while other sections of the economy have been allowed such pass through.¹⁶ Of course, the COLC should be allowed a sectoral approach to inflation but when there is no rational basis for treating nursing homes so harshly, this Court can only find the COLC regulations arbitrary and capricious and an undue interference with the cost reimbursement scheme set up by Congress for Medicare and Medicaid.

The Court is convinced from all the evidence presented that irreparable harm to the nursing industry will result if these regulations are not immediately and permanently enjoined. Furthermore, it is clear that the public interest will not be injured if these regulations are enjoined since there is no evidence that the nursing home industry is a major contribution to inflation. Furthermore, the Congress has established comprehensive and stringent measures to assure that reimbursement is only for "reasonable cost." As noted in the COLC memorandum:

Long term nursing care has grown over the last few years while Medicare has decreased. Long-term care facilities are providing care at a cost far less

¹⁴ COLC Option Paper at 4. It should be noted that although this is an option paper, the above-quoted section does not derive from a portion of the paper considering options. On the contrary, this information is from a section headed "Background." In addition, counsel for the government in open Court admitted that there are no statistics to show that the nursing home industry is in fact an inflationary factor in the economy requiring such stringent and discriminatory restrictions on cost reimbursement.

¹⁵ Affidavit of Robert J. Myers at 4. Professor Myers is an unquestioned expert in the field of Medicare and Medicaid and has published a book on Medicare. See generally for the drastic effects of COLC regulations on nursing homes. Affidavits of John E. Richard, Vice President of Oregon Health Care Association at 2 (threatens adequate level of patient care); Willis H. LaVance, Director of Finance and Accounting—Colorado Department of Social Services at 2 (might have to cut back services); James Hiniker, Deputy Commissioner, Minnesota Department of Public Welfare at 2 (quality of care may be jeopardized); Colan Taylor, owner of Taylor Nursing Homes at 2 (may have to cut back patient programs); LaVern Huenergardt, President of Colorado Health Care Association at 3 (have to cut back individual attention to each patient).

¹⁶ See Decision and Orders of the COLC, September 7, 1973, allowing all major automobile manufacturers pass through of "Federally mandated bumper and safety equipment costs for all 1974 model vehicles."

than hospitals. Additionally, as the Medicaid caseload increases, nursing homes come under far greater controls since Medicaid is regulated by Federal and State regulations. Therefore, the nursing homes are already dually controlled without price controls.¹⁷

In conclusion, the Court must add that it is aware of the proposed regulations of the COLC which might moot many of the objections presented to the Court by plaintiff. However, the Court is also aware that section 150.502 provides that the rules here challenged will remain applicable until the completion of the current fiscal year. The Court has been informed that some nursing homes would thus be subject to these arbitrary and capricious regulations until the Fall of 1974 since that is the end of their fiscal year due to their bookkeeping procedures. For this reason, the Court finds it inappropriate at this time to discuss the effect of the proposed regulations on plaintiff's complaint.

BYRON GASCH, *Judge*.

Dated: December 5, 1973.

(Slip opinion)

MURRAY ANDERSON, ET AL., ON BEHALF OF THEMSELVES AND
OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

JOHN T. DUNLOP, ET AL., DEFENDANTS-APPELLANTS

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-14

William C. White, Attorney, United States Department of Justice, (Irving Jaffe, Acting Assistant Attorney General, William E. Nelson and Allen W. Hausman, Attorneys, Department of Justice, on the brief) for Appellants.

Jerry S. Cohen, Washington, D.C. (Herbert E. Milstein, Michael D. Hausfeld of Harold E. Kohn, P.A., on the brief) for the Appellees.

Robert G. Nunn, Jr., William H. Bode, Alan S. Novins; Lobel, Novins & Laymont, Washington, D.C., on the brief for Amicus Curiae, Independent Gasoline Marketers Council.

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judges.
VAN OOSTERHOUT, Judge.

This is a timely appeal by John T. Dunlop and the officers and members of the President's Cost of Living Council (hereinafter collectively referred to as CLC) from order of the United States District Court for the District of Columbia, filed August 24, 1973, granting plaintiffs a temporary injunction. The injunction restrains CLC from "in any way applying to Plaintiffs and the class Phase IV Oil Regulations, Subpart L; or in any way implementing or enforcing said regulations as they relate to Plaintiffs and the class." The named plaintiffs are Murray Anderson and Joseph J. Grish.

Anderson operates a service station at Waycross, Georgia, handling Texaco brand gasoline and products. Grish operates two service stations, one located in Frazier, Michigan, and the other in Sterling Heights, Michigan, both of which are employed in the business of retailing Marathon brand gasoline and products. Both plaintiffs are retailers of brand name gasoline of major gasoline suppliers pursuant to an agreement with the supplier.

Plaintiffs allege that they bring this action on behalf of themselves and a class which consists of all service station dealers selling retail gasoline under the brand name of a major gasoline supplier pursuant to agreement with such supplier. It is asserted the class consists of about 165,000 members.

Jurisdiction of the District Court is based upon § 211(a) of the Economic Stabilization Act of 1970 as amended,¹ hereinafter called the Act. Our jurisdiction is founded on § 211(b) of the Act.

¹⁷ COLC Option Paper at 3-4. See pages 4 and 5, *supra*, as to Federal controls on reimbursement. It is important to emphasize that 75% of all nursing home revenues come from public sources; thus, this government control covers three-fourths of all nursing home monies.

¹ P.L. 91-379 as amended by P.L. 93-28, April 30, 1973, and P.L. 91-210 December 22, 1971.

This court on motion of CLC, resisted by plaintiffs, granted a stay of the District Court order granting the temporary injunction, observing that such action in no degree reflects a decision on the merits and that the stay is solely to maintain the status quo until a hearing on the merits of the appeal may be had. The hearing upon the appeal was advanced to September 17, 1973, and an accelerated briefing schedule was established and followed. Application of plaintiffs to the Chief Justice and subsequently to Mr. Justice Rehnquist to vacate our stay order was denied. We deferred consideration of plaintiffs' motion to reconsider our stay order until hearing on the merits on September 17. Oral arguments on the appeal were made on September 17, 1973, and the case was submitted.

Plaintiffs do not challenge the validity of the price Stabilization Act nor do they question the right of the President under the executive orders he issued to delegate to CLC the powers conferred upon him to regulate the price of crude oil and petroleum products.

Plaintiffs in brief state that their attack is confined to final Phase IV regulations, Subpart L. The gist of plaintiffs' contentions as evidenced by their complaint and brief is that the Phase IV, Subpart L regulations, as applied to plaintiffs and their class are arbitrary and capricious and are invidiously discriminatory, in violation of the Fifth Amendment.

Plaintiffs do not sell propane, No. 2 fuel oil, diesel fuel, or natural gas derivatives. The only regulated product they sell is gasoline. As retailers of gasoline, their markup is controlled by §150.352, Phase IV regulations, Subpart L. Such section provides that the ceiling price of a retailer for a particular octane of gasoline at a particular retail outlet shall be the weighted united average cost of the seller's inventory of that item on August 1, 1973, plus the actual markup applied by the seller at that outlet to the actual cost of gasoline on January 10, 1973, except that in no event shall the seller be required to use a markup of less than 7.00 cents a gallon in computing a selling price. Thus retailers who had a markup of more than 7.00 cents a gallon on January 10, 1973, were permitted to use such markup in computing their selling price, while retailers who because of a price war or for other reasons, had a markup of less than 7.00 cents a gallon on January 10, 1973, were permitted to use a 7.00 cents per gallon markup.

Plaintiffs assert that said regulation is discriminatory because it does not permit them to pass through increases in production costs since August 1, 1973, as increases in non-product costs such as rent, labor, insurance and maintenance. Plaintiffs also assert that they are the only retailers under Phase IV who are not allowed to pass through increases in product and non-product costs while their refiner suppliers may pass on their increased costs, and may do so through retail stations operated by the refiners, and thus receive preferential treatment. Complaint is also made that plaintiffs are discriminated against by not permitting them the small business exemption allowed generally to employers of less than sixty persons.

The trial court heard the temporary injunction application upon affidavits filed by the parties. The trial court's memorandum opinion reflects that it granted the injunction upon the basis of its conclusion of law, based upon its fact finding, that Subpart L of the Phase IV regulations as applied to the plaintiffs and their class are arbitrary and discriminatory and bear no rational relationship to the objective sought to be obtained by the Act and the Phase IV regulations, and that the regulations violate the due process clause of the Fifth Amendment.

Plaintiffs urge that the court's findings are based on undisputed facts. We disagree. CLC has filed extensive affidavits in the trial court in support of its contention that the regulations attacked are within the powers conferred upon the President by the Act and delegated to CLC, and that the regulations are reasonable and appropriate to accomplish the objective of the Act.

CLC states that the order granting the temporary injunction should be reversed by reason of errors committed by the trial court in the following respects:

1. Failure to require plaintiffs to exhaust available administrative remedies.
2. Failure to satisfy basic requirements for granting injunctive relief.
3. Finding that Subpart L regulations are violative of the due process clause of the Fifth Amendment.
4. Finding the individual plaintiffs properly represented a class consisting of some 165,000 independent retailers of brand name gasoline products.

For reasons hereinafter stated, we find that the plaintiffs have failed to exhaust available administrative remedies and that the order granting the temporary injunction should be reversed on that ground. Since such ruling is dispositive of this appeal, we do not reach nor express any view upon the other issues raised by CLC.

This court has squarely held in *City of New York v. New York Telephone Co.*, 468 F. 2d 1401 (Em. App. 1972), that the well-established doctrine of exhaustion of administrative remedies applies to actions arising under the Economic Stabilization Act. The reasonableness and logic of such holding is clearly demonstrated in Chief Judge Tamm's opinion in that case and need not be repeated here. In *City of New York*, we held:

"Clearly then, in light of the policy considerations and the legislative history, exhaustion is required in the context of this proceeding unless we find the administrative remedy provided inadequate." 468 F.2d 1401, 1404.

We are satisfied that an adequate administrative remedy is available. Section 207(b) of the Act provides:

"(b) Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking interpretation, modification, or rescission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings when deemed advisable, for considering such requests for action under this section: * * *

CLC, in conformity with the foregoing statutory direction, has in the Phase IV procedural regulations, 38 F.R. 21985, provided in § 155.41 to .43, a reasonable procedure for applying for individual or class exception, and in § 155.61 to .63, has provided procedures for applying for exemption or re-classification.

Charles Owens, administrator of the mandatory oil control program, in his affidavit filed in the trial court states that CLC has provided special procedures for expeditious consideration of individual claims for relief from the regulations to prevent serious hardship or inequities and has also provided for extensive monitoring of the entire retail gas system, and that plaintiffs have not requested an exception.

In *Meyers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41, 50-51 (1938), the Court holds:

"* * * no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."

In *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767-768 (1947), the Court holds:

"The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended to and could commit to such agencies for final decision."

In *City of New York*, we stated:

"Concepts of administrative autonomy also require that the Commission be given an opportunity to discover and correct its own errors. In this respect we have noted in our cases to date a healthy trend towards amendment of regulations when error or oversight has been pointed out to the Commission. Such autonomy lends itself to prompt, consistent price control policies which are essential to the administration of a nationwide program of price control. Finally, frequent deliberate skirting of the Commission may well result in an erosion of effectiveness and public confidence in the Commission which we must recall is a 'collaborative instrumentalit[y] of justice.'"

Such language has special application to the petroleum situation here involved. Petroleum prices were not significantly controlled in the early phase of price control. When it became apparent that the nation's supply of crude oil was inadequate to meet the nation's needs, the price of petroleum products began

to rise rapidly. In fixing prices, it was determined that consideration had to be given to the necessity of importing foreign crude oil which commanded higher prices than domestic crude and to offer price incentives which would encourage new domestic production. Detailed studies were made by experts in the full spectrum of the petroleum industry and reports were received and considered by CLC. Public notice was given of proposed regulations and opportunity was afforded interested parties to express their views. The plan adopted imposed a ceiling on crude oil and upon the retail price of gasoline and other petroleum products. The preamble to the Phase IV Subpart L regulations sets forth at length the reason for imposing ceilings on crude oil and products derived therefrom, and the procedure followed in fixing ceilings at the refinery and retail levels. Included therein is the following statement:

"The Council intends to monitor the ceiling prices of gasoline, No. 2 heating oil and No. 2-D diesel fuel and will make periodic upward adjustments in the ceiling prices for those products to account for increased cost of imports and of domestic crude."

Plaintiffs in their petition allege only by way of conclusion that they have exhausted all administrative remedies. No proof was offered that they have done so. The trial court made no finding on the exhaustion of remedies issue but instead determined "requiring plaintiffs to exhaust their administrative remedies would result in irreparable harm, in that in this case, time is crucial to protect the rights of plaintiffs and the class."

We hold that adequate administrative remedies were provided by the Act and regulations. There is no basis in the record for determining that application to CLC for exception, reclassification, or exemption would not receive fair consideration.²

The exhaustion of remedies point was presented in the trial court by CLC by motion to dismiss. As we determined in *City of New York*, the Act requires exhaustion of available adequate administrative remedies before resort to the courts is available. No factual basis here exists which would warrant a departure from the well-established rule that administrative remedies should be exhausted before resort to the courts. The order granting the preliminary injunction is reversed and the case is remanded to the trial court with directions to dismiss by reason of plaintiffs' failure to exhaust available administrative remedies.

Reversed and remanded.

MURRAY ANDERSON, ET AL., ON BEHALF OF THEMSELVES AND
OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

JOHN T. DUNLOP, ET AL., DEFENDANTS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1621-73

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came before the Court on August 22, 1973 on Plaintiffs' Motion for Preliminary Injunction. The Court, having considered plaintiffs' and defendants' memoranda, the affidavits and statements submitted and having heard argument of counsel, makes the following Findings of Fact and enters the following Conclusions of Law:

² We note that subsequent to the trial court's order, Dr. Dunlop in his news letter of September 14, 1973, announced that all retail dealers in gasoline and other petroleum products were asked to supply information on forms provided as to their prices, costs and margins on specified dates, and the further statement was made that on the basis of such information and information independently gathered by CLC and its monitoring program, the CLC will act promptly to make appropriate upward adjustments in ceiling prices. On September 28, 1973, an announcement was made by CLC of the revision of retail ceiling prices and the method of computing them with respect to gasoline which would result in increases ranging from 1 cent to 2½ cents per gallon. Such ceiling increases apparently do not meet all of the plaintiffs' objections to the gasoline ceiling regulations and thus render the case moot, but does give further support to the view that applications for relief because of inequities or hardship would receive fair consideration.

FINDINGS OF FACT

1. Plaintiffs are service station dealers selling retail gasoline under the brand name of a major gasoline supplier pursuant to agreements with said suppliers. They bring this action on behalf of themselves and a class composed of all other dealers similarly situated.

2. Pursuant to Section 203 of the Economic Stabilization Act of 1970, as amended (Public Law 91-379, 84 Stat. 799, August 15, 1970; Public Law 92-210, 85 Stat. 734, December 22, 1971; Public Law 93-28, April 30, 1973) (Act), the President, on August 15, 1971, established a freeze on prices, rents, wages and salaries for a limited period and established the Cost of Living Council (Council).

3. Defendants are members of the Council and were appointed by the President pursuant to Executive Order 11695.

4. Among the objectives of the Act and Cost of Living Council Regulations which are pertinent to this case are to moderate the rate of inflation which has existed in the United States during the first six months of 1973; to continue expansion of the United States economy to fulfill its potential with further increases in employment; and to reduce long run inflationary forces.

5. In response to sharply rising domestic crude oil and wholesale and retail gasoline prices in April 1973, the Director of the Council ordered his staff to study the subject and to make policy recommendations designed to alleviate these problems.

6. On July 18, 1973, the President declared that among the general policy considerations to be applied in promulgating the current Phase IV price control regulations are the following: That prices be permitted to rise as much as costs rise, in dollars per unit of output without any profit margin on the additional costs; and that Phase II exemptions for firms with sixty employees or fewer be repeated in Phase IV.

7. A study was made and recommendations for regulations were submitted to the Director and reviewed and approved by the President's Oil Policy Committee and subjected to staff review within the Executive Branch. These proposed regulations were published in the Federal Register, for comment on July 20, 1973. On August 17, 1973 the Council issued Phase IV Oil Regulations.

8. Plaintiffs and the class are the only class of retailers employing sixty or fewer individuals who are not exempt from the regulations.

9. There is no factual or statistical information or material justifying the failure to make the small business exemption under the regulations applicable to plaintiffs and the class.

10. There is no rational relationship between the objectives of the regulations and the denial to plaintiffs and the class of their small business exemption.

11. All segments of the economy and all other classes of retailers are allowed under the regulations to pass through increased costs on a dollar for dollar basis with the exception of plaintiffs and the class.

12. Plaintiffs and the class have been singled out from among all other classes in that they must absorb all their nonproduct cost increases since January 10, 1973.

13. Plaintiffs and the class have been singled out from all other classes and in particular, all petroleum firms, in that they must absorb all product cost increases after August 1, 1973.

14. Plaintiffs and the class are the only class whose principal supplier is allowed to pass on his costs both in product and otherwise to Plaintiffs and the class while they, in turn, may not pass on such costs in their sales to the general public.

15. The Phase IV January 10, 1973, date for the establishment of price margins for plaintiffs and the class is an arbitrary date, bearing no reasonable relationship to the ends sought to be achieved under the Regulations.

16. The application of Subpart L of the August, 1973 Oil Regulation to plaintiffs and the class would require plaintiffs and substantial members of the class to go out of business or otherwise sustain substantial and severe economic injury.

17. The establishment of a refiner-retailer class within Subpart L, with separate and distinct regulations applicable thereto, has no rational foundation and confers a competitive advantage upon said class not available to plaintiffs and the class.

18. Establishment of a refiner-retailer class within Subpart L is inconsistent with the objectives of the Act and the Regulations.

19. Requiring plaintiffs to exhaust their administrative remedies would result in irreparable harm, in that in this case, time is crucial to protect the rights of plaintiffs and the class.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this action pursuant to Section 211 of the Economic Stabilization Act, as last amended by P.L. 93-28 (April 30, 1973).

2. Venue is proper.

3. Subpart L of the Phase IV Oil Regulations as applied to plaintiffs and the class is arbitrary and capricious within the meaning of the Act.

4. Subpart L as applied to plaintiffs and the class discriminates against plaintiffs and the class and violates the due process clause of the Fifth Amendment.

5. The provisions and regulations of Subpart L as applied to plaintiffs and the class are arbitrary and discriminatory and bear no rational relationship to the ends sought to be achieved by the Act or of Phase IV regulations in general and, therefore, violate the due process clause of the Fifth Amendment.

6. Plaintiffs have made a sufficiently strong showing that they are likely to prevail on the merits of this suit.

7. The preliminary injunction should be granted.

BARRINGTON D. PARKER,
U.S. District Judge.

Dated August 24, 1973.

Copies to:

Jerry S. Cohen, Herbert E. Milstein, and Michael D. Hausfeld, Esqs.,
1776 K Street NW., Washington, D.C. 20006; Harold E. Kohn, Esq.,
1214 IVB Building, 1700 Market Street, Philadelphia, Pa. 19103;
Irving Jaffe, Esq., Acting Assistant Attorney General, William E.
Nelson, William C. White, and Allen W. Hausman, Esqs., Department
of Justice, Washington, D.C. 20530.

MURRAY ANDERSON, ET AL., ON BEHALF OF THEMSELVES AND
OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

JOHN T. DUNLOP, ET AL., DEFENDANTS

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1621-73

ORDER

This cause having come on before the Court on Plaintiffs' Motion for Preliminary Injunction; the Court having considered the Plaintiffs' and Defendants' memoranda and the affidavits submitted and having heard argument of counsel; and

The Court further having determined that Subpart L of the Phase IV Oil Regulations as applied to Plaintiffs and the class is arbitrary and capricious within the meaning of the applicable section of the Economic Stabilization Act, as amended; and that Subpart L as so applied to Plaintiffs and the class violates the due process clause of the Fifth Amendment to the United States Constitution; and

The Court having further found that Plaintiffs and the class have made a sufficiently strong showing that they are likely to prevail on the merits herein and that irreparable harm will result if a Preliminary Injunction is not issued; and that the public interest would be served by the issuance of a Preliminary Injunction herein; and it further appearing that Defendants have acted on grounds generally applicable to Plaintiffs and the class.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants, their agents, employees and attorneys are hereby temporarily enjoined from in any way applying to the Plaintiffs and the class Phase IV Oil Regulations, Subpart L; or in any way implementing or enforcing said regulations as they relate to Plaintiffs and the class.

BARRINGTON D. PARKER,
U.S. District Judge.

Dated: August 24, 1973.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
PLAINTIFFS-APPELLANTS

v.

COST OF LIVING COUNCIL, ET AL., DEFENDANTS-APPELLEES,
THE BUSINESS ROUNDTABLE, DEFENDANT-INTERVENOR

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. DC-17

Alan M. Silbergeld, Consumers Union, Washington, D.C. (Peter H. Schuck, Consumers Union, with him on the brief) for the Appellants.

James Elkins, Attorney, U.S. Department of Justice, Washington, D.C. (Irving Jaffe, Acting Assistant Attorney General, William E. Nelson and William White, Attorneys, U.S. Department of Justice, with him on the brief) for the Government-Appellees.

John G. DeGooyer, Hamel, Park, McCable & Saunders, Washington, D.C., for the Intervenor.

Before TAMM, Chief Judge, HASTIE and ESTES, Judges.

ESTES, Judge.

This is an appeal under Section 211 of the Economic Stabilization Act of 1970, as amended (the Act), by plaintiffs, Consumers Union of United States, Inc., William D. Hathaway, and Peter J. Petkas, from orders of the United States District Court for the District of Columbia denying plaintiffs' motion for summary judgment and granting the motions for summary judgment made by the defendants, the Cost of Living Council (CLC), Dr. John T. Dunlop, its Executive Director, and William N. Walker, its Acting Deputy Director, and by defendant-intervenor, The Business Roundtable.

On July 17, 1973 plaintiffs filed their complaint in the district court seeking a declaratory judgment that certain of the CLC's public disclosure regulations, 6 C.F.R. §§ 102.50 et seq., were illegal, and seeking an injunction rescinding those regulations and requiring the issuance of new regulations which comply with Section 205 of the Act. On August 22, 1973 plaintiffs filed an amended complaint to reflect the fact that Phase IV regulations had replaced the Phase III regulations challenged by the original complaint. On October 15, 1973 the motion of The Business Roundtable to intervene as a defendant was granted with defendants' approval but over plaintiffs' objection. The district court granted the defendants' and the defendant-intervenor's motions for summary judgment on November 2, 1973. Plaintiffs filed their notice of appeal with this Court on November 6, 1973.

Three principal issues were involved in this appeal. One of these issues, which has not been raised by any of the parties or the court below, will be considered first.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Part 102 of the CLC's regulations is entitled "Public Access to Records." Plaintiffs are challenging the legality of those parts of Subpart F (6 C.F.R. §§ 102.51-102.56) of Part 102 which declare what information submitted to the CLC shall or shall not be subject to public disclosure. Subparts B and C provide an administrative procedure whereby requests for information may be filed with the CLC's Assistant Director for Public Affairs. Subpart E provides that adverse determinations made by the Assistant Director may be appealed within 30 days to the Director of the CLC.

In this case no information was requested of the CLC until August 17, 1973, one month after the original complaint had been filed in the district court. On that date the CLC Assistant Director received from Mark Silbergeld, an attorney for plaintiff Consumers Union, a letter request for certain information. The reply of the Assistant Director, received by the plaintiff on October 19, 1973, summarized the provisions of Subpart F and pursuant thereto refused to make available most of the information sought. On November 6, 1973, the same day that a notice of appeal was filed with this Court from the November 2, 1973 district court orders, Consumers Union wrote to the CLC Director, Dr. John T. Dunlop, to appeal from the October 19, 1973 determination by the Assistant Director. The record does not reflect that Dr. Dunlop has made a determination of the administrative appeal.

This Court follows the well-known rule requiring exhaustion of administrative remedies. *City of New York v. New York Telephone Co.*, 468 F.2d 1401 (T.E.C.A. 1972).¹ Clearly, plaintiffs did not exhaust their administrative remedies before filing the action below. Strict application of the doctrine would require us to dismiss this case. In determining whether to apply the doctrine, it is appropriate to consider whether the policies that give rise to the doctrine would be furthered by its application to the circumstances of the case, and whether exceptions to the rule are present.

One reason often given for requiring exhaustion is that after a dispute has been determined by all available administrative procedures, the issues in dispute between the parties will be better framed and thus more susceptible of judicial determination. In the present dispute, however, there are no factual issues in dispute, and the question involved is a purely legal one as to whether the CLC's public disclosure regulations are in violation of Section 205 of the Act. That question was adequately framed by the pleadings and exhibits in the district court, which ruled for the defendants on their motions for summary judgment. Since there is no question as to the nature of the issues in dispute between the parties, this policy reason behind requiring exhaustion does not favor application of the doctrine to this case.

A second reason for the doctrine is that requiring exhaustion will insure that the agency is given an opportunity to apply its particular administrative expertise to the question being reviewed. This policy is usually applied to the determination of technical factual disputes or to the determination of disputes involving the agency's interpretation of its own regulations or orders. In both situations the reviewing court would be aided by having the informed opinion of the agency. In this case, however, there is neither a technical factual dispute nor a dispute involving the CLC's interpretation of its orders or regulations. Instead, as mentioned above, the dispute is a legal one only, and there is no question as to the interpretation of the CLC's regulations. Those regulations are clear; the dispute is whether they are in excess of the authority given by Section 205 of the Act. We find that this policy reason for exhaustion would not be furthered by application of the doctrine to these circumstances.

A third reason for requiring exhaustion is that if, through the administrative review process, the agency is made aware of the faults of its policies, it may change them on its own volition, thus removing the need for judicial review or making moot a pending judicial proceeding. "In this respect we have noted in our cases to date a healthy trend towards amendment of regulations when error or oversight has been pointed out to the [agency]." *City of New York v. New York Telephone Company*, 468 F.2d 1401, 1403 (T.E.C.A. 1972). Were it not for the fact that plaintiffs' views as to the illegality of these regulations have been repeatedly made known to the CLC since May 30, 1973, we might consider this an appropriate case for the application of this policy. On May 8, 1973 the CLC issued its proposed regulations for the implementation of Section 205, inviting interested persons to participate in the proposed rule making by submitting written data, views, or comments. On May 30, 1973 plaintiff Hathaway filed comments contending that the proposed regulations were illegal in violation of Section 205. On May 29, 1973 and June 4, 1973 plaintiff Petkas filed comments of the same import. On May 18, 1973, the CLC announced the scheduling of a hearing for June 6, 1973, for the purpose of hearing comments on the proposed regulations by interested parties. Plaintiffs Hathaway and Petkas attended the hearing and testified in opposition to the proposed regulations. On June 15, 1973 the CLC promulgated as final regulations the proposed regulations which had been the subject of the hearings and comments above. Under these circumstances it would not appear likely that the CLC would now decide to replace its regulations because of plaintiff Consumer Union's administrative appeal.

Thus we decide that under the exceptional circumstances of this case the doctrine of exhaustion of administrative remedies does not prevent our consideration of this appeal. We emphasize, however, that in the usual case arising under the Economic Stabilization Act, policies favoring exhaustion will no doubt apply, and plaintiffs should be extremely wary of commencing actions in court when an adequate administrative remedy lies open to them but has not been pursued.

¹ "Clearly then, in light of the policy considerations and the legislative history, exhaustion is required in the context of this proceeding unless we find the administrative remedy provided inadequate." 468 F. 2d at 1404. "Furthermore, we find none of the well-known exceptions to the exhaustion rule applicable here." *Id.* n. 15.

WHICH FIRMS MUST DISCLOSE?

Under Phase III of the Economic Stabilization Program, quarterly reports to the CLC were required of all firms with annual sales or revenues of \$250 million or more. [6 C.F.R. § 130.21(b)]. Public disclosure was required of all such firms. (6 C.F.R. § 102.50). Under Phase IV regulations, the number of firms required to report has been extended to include all firms with annual sales or revenues of \$50 million or more (6 C.F.R. § 150.161), but the regulations retain the Phase III requirement that public disclosure applies only to those firms with annual sales or revenues of \$250 million or more. (6 C.F.R. § 102.51). Plaintiffs contend that this Phase IV requirement is in violation of Section 205(b)(1), which provides in relevant part that "Any business enterprises subject to the reporting requirements under section 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973, shall make public any report. . . ."

The public disclosure section in question, Section 205 of the Act, was added to the statute during Phase III as a part of the Economic Stabilization Act Amendments of 1973, P.L. 93-28, April 30, 1973. Thus Congress considered the question of public disclosure in light of which firms were required under Phase III to report and to disclose, and explicitly required that the firms which would be required to disclose under the new Section 205 were those which were required to file quarterly reports "under section 130.21(b) of the [CLC] regulations in effect on January 11, 1973 . . .," that is, those with annual sales or revenues of \$250 million or more. Plaintiffs would have us find that Congress did not mean what it said, but meant instead that disclosure was to be required of whichever firms were required to report to the CLC by the successor regulations to the Phase III regulation mentioned in Section 205 of the statute. They would have us require the CLC to issue new regulations requiring public disclosure of all firms of \$50 million or more annual sales or revenues, since those firms are now required under Phase IV to file quarterly reports to the CLC.

We find it unnecessary to consider this issue at length. Section 205(b)(1) on its face clearly and specifically calls for disclosure by those businesses that were required to report to the CLC by "section 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973." The statute plainly calls for disclosure only by firms of more than \$250 million annual sales or revenues, and the CLC Phase IV regulations being challenged do likewise.

WHAT INFORMATION MUST BE DISCLOSED?

Plaintiffs' principal contention below, and on this appeal, is that specified parts of the CLC's regulations (Subpart F of Part 102, 6 C.F.R. §§ 102.51-102.56), determining what information reported to it is subject to public disclosure, are illegal because they are contrary to the requirements of Section 205(b)(3) of the Act. Section 205(b)(3) provides:

"Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of the business enterprise."

This subsection thus operates as a limitation on the discretion of the CLC, granted by Section 205(b)(2), to exclude from public disclosure information or data that is proprietary in nature. Any information submitted to the CLC must fall into one of the three statutory categories: (1) information concerning trade secrets, etc., which must be excluded from public disclosure, (2) information which would have to be reported to the Securities and Exchange Commission (SEC) by a single product-line or single service-line company, which cannot be excluded from public disclosure, and (3) all other information, which the CLC may or may not define as proprietary and thus excludable from public disclosure.

The CLC's regulations require the filing of quarterly reports on its forms CLC-2 (Phase III) or CLC-22 (Phase IV). The forms must contain the information specified therein. For the purposes of public disclosure, Section 102.54(a)(3) provides that each firm shall submit with its quarterly report four extra, or

"public disclosure" copies from which has been omitted all information or data defined as proprietary and excludable from public disclosure by Sections 102.55 or 102.56. Section 102.54(c) provides that interested persons may examine the public disclosure copies of the reports at the appropriate Internal Revenue Service District Office.

Sections 102.55 and 102.56 specify which items on forms CLC-2 and CLC-22 are proprietary (excludable) information. A reading of those sections will reveal that the CLC has defined as proprietary all items which are, or are based on, annual sales or revenues, net sales, operating income, and sales by product line or service line. None of the parties disputes that such accounting items are required to be reported to the SEC. However, as the CLC points out in Section 102.55(a) (2), its definitions for net sales and operating income "are not the same as those used for SEC purposes because they exclude revenues from foreign operations, public utilities, farming activities and insurance activities. Since such general financial data, thus more narrowly defined, is not required for SEC purposes, it can be excluded from the public annual reports to the SEC and is, therefore, defined as proprietary data. . ." Annual sales or revenues is also defined as proprietary, on the basis that the CLC's "special definition of annual sales or revenues results in a figure not disclosed in the SEC Form 10-K." Section 102.55(a) (1).

This dispute thus focuses upon the meaning of that clause of Section 205(b) (3) of the Act which prohibits the CLC from defining as proprietary and excludable from public disclosure "information or data which cannot currently be excluded from public annual reports . . ." to the SEC. Plaintiffs contend that the words "information or data" mean "types of information or data," that since annual sales or revenues, net sales, and operating income are required by the SEC, then the CLC is bound by the statute to define such items as non-proprietary information, and that the statutory command applies regardless of the variation in defining the items by the CLC and the SEC. The actual effect of the defendants' argument, although disclaimed by intervenor, is that the words "information or data" mean "numerically identical information or data." Defendants contend that since, for example, the net sales figure reported on the CLC form will not be the same figure as the net sales figure reported to the SEC, then the CLC form net sales figure is not SEC data, and the CLC is not prohibited by the statute from defining its net sales figures as proprietary and excludable from public disclosure. Defendants also argue that the CLC was bound to define very narrowly what information is nonproprietary because Section 205(a) makes reference to 18 U.S.C. § 1905, which provides criminal penalties for any officer of the government who "discloses, or makes known in any manner or to any extent not authorized by law" any information required to be filed with an agency. The plaintiffs respond by noting that in this case the defendants were not only authorized to disclose the information, but were forbidden by the statute from withholding it. Further, they note that Section 205(a) specifically excepts Section 205(b) from the reference to the applicability of 18 U.S.C. § 1905.

Although both plaintiffs and defendants have brought certain portions of the legislative history to our attention, we have found, and the parties do not argue otherwise, that the legislative history as a whole is not clearly dispositive of the problems outlined above. The Congressional purpose in amending Section 205 was to grant access by interested members of the public to financial data on CLC reporting forms so that the public could better monitor the degree of compliance by business with the Economic Stabilization Program. The amendment's sponsor and principal supporters stated that it would give the public a basis for making independent judgments on reporting companies' compliance with the rules of the program, and that it would put these companies on notice that price increases above 1.5 percent on any substantial product would subject them to public scrutiny. S. Rep. No. 93-63, Senate Committee on Banking, Housing and Urban Affairs, 93d Cong., 1st Sess. 8 (1973). Plaintiff Senator Hathaway was the author of the original amendment, which is now Section 205(b) (1). Standing alone this amendment would apparently have made almost all information reported to the CLC subject to public disclosure. The Senate then adopted an amendment, now Section 205(b) (2), which was offered by Senator Tower. This amendment provides that *proprietary* information concerning income, profits, losses, and costs could be excluded from public disclosure. Senator Hathaway proposed another amendment, which was adopted and is now Section 205(b) (3). Cong. Rec., March 20, 1973, S 5314. As discussed above, it is Section 205(b) (3) that provides which information can or cannot be defined as proprietary.

The CLC argues that its regulations permit public access to sufficient information to monitor compliance with the program. The Business Roundtable argues

that to require the public disclosure of the business information sought by plaintiffs would give an unfair competitive advantage to a reporting firm's foreign and domestic competitors who are not required to report. Neither argument is responsive to the issue of whether the public disclosure regulations meet the terms of the statute requiring their promulgation. Whether the public is provided sufficient information to monitor compliance, and whether some adverse competitive advantages may result, are public policy considerations within the usual province of the Congress.²

CLC gives no reasonable explanation related to the objectives of the Act,³ particularly Section 205 forbidding the CLC to "define as excludable *any* [SEC] information or data . . .," as to *why* the CLC decided that the information in dispute was not SEC data and therefore should be withheld from public disclosure. The only reasons advanced are that the CLC and SEC definitions are not the same, thus the figures reported will not be the same, and that, therefore, the CLC contends, it may define the information as proprietary because it is not SEC data. We are not told on what basis the CLC decided that *Congress* intended public disclosure only of information or data which has been defined identically by both agencies. While there are generally recognized meanings for the accounting terms "sales," "net sales," "operating income," etc., we think it is indisputable that different companies, and different government agencies, will use slightly varying methods of computing these figures to meet the needs of the companies or agencies. Indeed, it is probably the rule, rather than the exception, that one will find minor definitional differences between businesses and between agencies. Congress surely knew this when it enacted Section 205(b)(3), and, therefore, we find it unrealistic to assume, as defendants' argument would have us do, that Congress intended "information or data" to mean "numerically identical information or data." Instead, we think that when Congress, with knowledge that the SEC requires public disclosure of, for example, net sales figures reported to it, enacted Section 205(b)(3) forbidding the CLC to define as proprietary any information required to be reported to the SEC, Congress intended that any net sales figures reported to the CLC could not be defined as proprietary and excludable.

The defendants' position on this issue results in an anomaly. While Congress used the mandatory language "may not define as excludable," which would seem to leave no discretion, the CLC's rationale would permit it to avoid completely the effect of this provision of the statute by simply using definitions which differed from those of the SEC. We think Congress intended these words to have an effect, and that that intended effect was to withhold from the CLC any discretion to exclude from public disclosure business information required by the SEC.

Defendants argue that they were required to define very narrowly what information is nonproprietary because Section 205(a) makes reference to 18 U.S.C. § 1905, which provides criminal penalties for any officer of the government who "discloses, or makes known in any manner or to any extent not authorized by law," any information required to be filed with an agency. While we understand that the CLC is conscientiously endeavoring to release only that information which it is authorized to release, in this case the CLC was not only authorized to release the information, it was forbidden by Section 205(b)(3) from defining the information as proprietary and preventing its release. Furthermore, the CLC apparently overlooked the fact that the reference to 18 U.S.C. § 1905 in Section 205(a) is preceded by the words "Except as provided in subsection (b). . . ." We hold that for these reasons the members of the CLC have no need to fear prosecution under 18 U.S.C. § 1905 for defining information reported to the CLC as nonproprietary when the statute required them to do so.

Having found that the CLC regulations defining proprietary information, 6 C.F.R. § 102.55(a)(1), (2) and (4); 6 C.F.R. § 102.56(a)(1), (2), and (4), are illegal because in contravention of Section 205(b)(3) of the Act, we turn to the question of the relief to be given the plaintiffs. Considering the emergency nature of the stabilization program being administered by the defendants, we think it is not inappropriate to consider the impact that an invalidation of these regulations might have on administration. Fortunately it appears that in this case there will

² In *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), cited in *Richardson v. Belcher*, 404 U.S. 78, 81 (1971), the Supreme Court stated: "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

³ Section 202 states that the objectives are "to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar. . . ."

be very minimal, if any, disruptive effects caused by such a determination. The CLC will be required to issue new regulations in conformance with this opinion.⁴ Other than that, however, there will be no additional "red tape" for the defendants, reporting businesses, or the members of the public. The reporting businesses will continue to submit public disclosure copies of the reports, and the public will examine them as it has before. The only difference will be that the CLC, through its new regulations, will have reduced the number of items that may be omitted from the public disclosure copies.⁵

Accordingly, it is ORDERED that this cause be remanded to the trial court for further proceedings in accordance with this opinion; that the trial court's orders denying plaintiffs' motion for summary judgment and granting defendants' and intervenors' motion for summary judgment be vacated, and that plaintiffs' motion for summary judgment be granted only to the extent expressly indicated by this opinion; and that an injunction be issued ordering the CLC to prepare and issue new regulations in accordance with Section 205(b)(3) of the Act, as interpreted herein, to replace the existing Sections 102.55(a)(1), (2), and (4) and 102.56(a)(1), (2), and (4) of its regulations, defining proprietary information, as soon as is practicable under the circumstances.

SO ORDERED.

ECONOMIC STABILIZATION PROGRAM,
COST OF LIVING COUNCIL,
Washington, D.C.

DEAR SIR: Section 205 of the Economic Stabilization Act of 1970, as amended in 1973, and as implemented by 6 CFR Part 102 of the Phase IV regulations, requires certain business enterprises to make public some of the information they report under the Economic Stabilization Program regulations to the Cost of Living Council. This requirement applies to any business enterprise which (1) has \$250 million or more in annual sales or revenues, (2) is obligated to submit quarterly reports to the Cost of Living Council, and (3) charges a price for a substantial product which exceeds by more than 1.5% the prices lawfully in effect for that product on January 10, 1973, or on the date 12 months preceding the end of the quarterly reporting period, whichever is later.

A firm which meets these criteria is obligated to make public the nonproprietary data contained in the Forms CLC-22 and supporting schedules which it submits as quarterly reports. Part 102 of the Economic Stabilization Program regulations specifies what data on the Form CLC-22 must be made public.

Enclosed are copies of § 205 of the Economic Stabilization Act of 1970, as amended, Cost of Living Council public disclosure regulations, a questionnaire, and a certification concerning public disclosure which must be filed as part of the Form CLC-22 by firms with \$250 million or more in annual sales or revenues which have not raised prices sufficiently to trigger the requirement of public disclosure.

Many firms operate on a calendar year basis and will consequently be filing the required quarterly reports on or about November 15, 1973. The purpose of this letter, therefore, is to remind you of the public disclosure requirements, to provide explicit guidance with respect to these requirements, and, finally, to determine the extent of current compliance with § 205 of the Act and Part 102 of the Economic Stabilization Program regulations.

Failure to file the necessary information for public disclosure on the same date as quarterly reports are due may be a violation subject to penalty under the Economic Stabilization Act.

⁴ For the guidance of the court below and the parties, the above sections of the regulations (and their predecessors dealing with form CLC-2) are held illegal insofar as they define as proprietary the information required on lines 7 through 18, line 24 (column c), lines 27 through 33, and lines 35 through 39 of present form CLC-22. Section 205(b)(3) of the Act prohibits the CLC from defining as proprietary any information or data which would in fact be reported to the SEC by a single product-line manufacturer or seller. Slight definitional variances between CLC terms and SEC terms are not sufficient grounds for the CLC to define information as proprietary when that information is of the same nature as that required by the S.E.C. Unless a reasonable explanation, related to the objectives of the Act, is shown, the CLC may not use definitional variances as a justification for issuing regulations which restrict the effectiveness of Section 205 in furthering public disclosure to insure compliance with the Act.

⁵ We recognize, however, that for quarterly reports filed after the amendment of Section 205 on April 30, 1973, revised public disclosure copies, prepared in accordance with the regulations to be issued to replace those herein declared invalid, must be made available for examination by members of the public, in accordance with the "Disclosure procedure" prescribed by present 6 C.F.R. § 102.54.

We, therefore, ask that you file the documents required by Cost of Living Council regulations in a timely manner and complete and promptly return the enclosed questionnaire. Written inquiries on this matter should be addressed to the Office of the General Counsel, Cost of Living Council, 2000 M Street, N.W., Washington, D.C. 20508. "Public Disclosure Inquiry" should be marked on the envelope.

The Cost of Living Council greatly appreciates your corporation with the Economic Stabilization Program.

Very truly yours,

JAMES W. McLANE,
Deputy Director.

Enclosures.

[ATTACHMENT 1]

SECTION 205 OF THE ECONOMIC STABILIZATION ACT OF 1970, AS AMENDED

(Omitted and included as part of the text of attachment 2.)

[ATTACHMENT 2]

[From the Federal Register, Aug. 15, 1973]

TITLE 6—ECONOMIC STABILIZATION

CHAPTER I—COST OF LIVING COUNCIL

PART 102—PUBLIC ACCESS TO RECORDS

Miscellaneous Amendments

The purpose of this revision of Part 102 of Title 6 of the Code of Federal Regulations is to set out the regulations of the Cost of Living Council governing access to records during Phase IV.

These regulations are basically a continuation of the regulations in effect during Phase III. There are two major changes. First, this part now contains, in Subpart G, regulations governing inspection of Internal Revenue Economic Stabilization records. Subpart G sets out unchanged the provisions which were adopted during Phase II and set out in Chapter IV, Part 4, Subpart K.

The second major change is the adoption of regulations defining which parts of Form CLC-22 are subject to disclosure under § 205 of the Economic Stabilization Act of 1970, as amended.

Section 6 of the Economic Stabilization Act Amendments of 1973 (Public Law 93-28), enacted on April 30, 1973, required firms which met certain criteria to make public parts of their quarterly reports to the Cost of Living Council. Although section 6 required businesses, and not the Council, to disclose the reports, the Freedom of Information Act, 5 U.S.C. 552, in turn required the Council to make these reports public. Section 6 also directed the President or his delegate to issue regulations specifying what parts of those reports did not need to be made public.

In accordance with this last requirement, the Council issued proposed regulations on May 11, 1973 (38 FR 12413), held public hearings on June 6, 1973, and issued final regulations on June 20, 1973 (38 FR 16023), which appear as Subpart F or Part 102 of Title 6 of the Code of Federal Regulations.

On July 18, 1973, the President directed the Council in Executive Order 11730 to publish proposed plans for Phase IV. On July 19, 1973 the Council issued in proposed form some of the regulations for Phase IV, on which it invited public comment. These regulations were published in final form on August 7, 1973. The Council today is publishing public disclosure regulations for Phase IV, in accordance with the requirements imposed on the Council by section 6 of the Economic Stabilization Act Amendments of 1973.

Section 6 amended section 205 of the Economic Stabilization Act of 1970, which as amended reads:

"Section 205 Confidentiality of information.

"(a) Except as provided in subsection (b), all information reported to or otherwise obtained by any person exercising authority under this title which contains or relates to a trade secret or other matter referred to in section 1905 of

title 18, United States Code, shall be considered confidential for the purposes of that section, except that such information may be disclosed to other persons empowered to carry out this title solely for the purpose of carrying out this title or when relevant in any proceeding under this title.

“(b) (1) Any business enterprise subject to the reporting requirements under § 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973, shall make public any report (except for matter excluded in accordance with paragraph (2) so required which covers a period during which that business enterprise charges a price for a substantial product which exceeds by more than 1.5 per centum the price lawfully in effect for such product on January 10, 1973, or on the date twelve months preceding the end of such period, whichever is later. As used in this subsection, the term ‘substantial product’ means any single product or service which accounted for 5 per centum or more of the gross sales or revenues of a business enterprise in its most recent full fiscal year.

“(2) A business enterprise may exclude from any report made public pursuant to paragraph 1 any information or data reported to the Cost of Living Council, proprietary in nature, which concerns or relates to the amount or sources of its income, profits, losses, costs, or expenditures but may not exclude from such report, data, or information, so reported, which concerns or relates to its prices for goods and services.

“(3) Immediately upon enactment of this subsection, the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of the business enterprise.”

The application of section 215(b) is limited by its terms to any report required “under § 130.21(b) of the regulations of the Cost of Living Council in effect on January 11, 1973.” Section 130.21(b) of the Council’s regulations, to which section 205(b) of the Act refers, has been superseded for most sectors of the economy effective August 12, 1973, when Phase IV begins. The issue, therefore, is whether the amendment to section 205, which specifically incorporates a Phase III regulation, has any effect when Phase III is superseded by Phase IV.

In Phase III, firms over \$250 million had to file quarterly reports, while in Phase IV firms over \$50 million must file. Consequently, a subsidiary issue is whether or not section 205, assuming it remains in effect in Phase IV, applies only to firms over \$250 million, or to all firms subject to the Council’s Phase IV reporting requirements, i.e., all firms over \$50 million in annual sales or revenues.

The reporting requirements of Phase III defined a price reporting firm as a firm with annual sales or revenues of \$250 million or more, and § 130.21(b) required each price reporting firm to submit quarterly reports to the Council.

Phase IV regulations contain provisions which are analogous in their function of requiring quarterly reports, but which are far broader in their coverage. Sections 150.41 and 150.42 define Price Category I and II firms as, respectively, those firms with \$100 million or more and with \$50 to \$100 million in annual sales or revenues. Section 150.161 requires Price Category I and II firms, with certain exceptions, to submit quarterly reports. So Phase IV’s quarterly reporting requirements are far more extensive than those of Phase III. Phase III required fewer than 700 firms to report quarterly, while Phase IV will demand quarterly reports of more than four times that number.

Since section 205 is tied so specifically to a section of the Phase III regulations, and since that section is due to terminate on August 12, 1973, the strictest reading of the Act would leave section 205(b) without effect after August 11, 1973.

It is a general rule of statutory interpretation that one looks to Congressional intention only when the words of a statute are unclear. But the Council is required in Phase IV to go behind the wording of the amendments in order to determine the extent to which the amendments modify the application of 18 U.S.C. 1905, which makes disclosure of certain information by Federal Officers a criminal offense, and which, absent the applicability of section 205, requires that the Council keep the quarterly reports confidential.

The legislative history does not speak directly to the question of whether section 205(b) was intended to survive the passing of Phase III. The discussions

dealt with problems which were specific to Phase III, and it was in these terms that the amendment's sponsors presented the need for the amendments.

The report of the Senate Committee on Banking, Housing and Urban Affairs on the amendments (Report No. 93-63) stated that:

"Phase III already places the burden of combating inflationary price increases **on the public**. By removing from the Federal Government the initiative for enforcing price controls, and by declaring that such controls as remain be self-administered by the companies, * * * Phase III in effect determines that no action will be taken on excessive price increases unless there is a public outcry of some magnitude * * *

"Public disclosure . . . should provide some counterweights to the power the **self-administering aspects of Phase III give the large companies.**"

Senator Hathaway, who authored the amendment, said that "a disclosure provision of the sort proposed here is essential to maintain public confidence in the administration's anti-inflationary program, especially in view of the **voluntary nature of the controls under Phase III**" (119 Daily Cong. Rec. S 5118).

Not only was the need for public disclosure described as stemming particularly from Phase III's voluntary nature, but the remedy went into effect when a firm exceeded a standard related to the Phase III standard—the alternative price standard of a 1.5 percent weighted annual average price increase set out in § 130.13. The Senate Committee on Banking, Housing and Urban Affairs report, referred to above, stated that:

"The figure of 1.5 percent comes from the general standard for price adjustments set out in § 130.13 of the

"Cost of Living Council regulation * * *.

* * * * *

"The purpose of this amendment is to give the public a means of fighting price increases which exceed Phase III guidelines."

The standard set out in the Act is not the same as that found in § 130.13 of the Council regulations, in that section 205(b) (1) of the amended Act speaks of a price "which exceeds by more than 1.5 per centum the price lawfully in effect . . . on January 10, 1973 . . ." while § 130.13 of the Council regulations speaks of "a weighted annual average of 1.5 percent over prices authorized or lawfully in effect on January 10, 1973 . . .". Thus a firm could trigger section 205(b) (2) without violating the Phase III guidelines. There were several other differences, but this was the most apparent.

It appears from the debates, however, that the Senators thought the amendment's 1.5 percent trigger and the Council's Phase III guidelines were the same. Senator Hathaway explained the amendment, which he sponsored, as requiring:

"public disclosure . . . by certain very large companies [when] * * * such a company raises the price of a substantial product by more than 1.5 percent a year—the phase III guidelines on price increases" (119 Daily Cong. Rec. S 5118). Senator Hathaway consistently explained his amendment in terms of the "1.5 percent guidelines" or the "phase III guidelines."

"My amendment, without interfering with the looser and self-administering aspects of phase III, just gives these companies the impetus to keep price increases in line with phase III guidelines * * *" (119 Daily Cong. Rec. S 5119).

The amendment was also tied to the specific coverage of the Council's reporting requirements—to firms with \$250 million or more in annual sales or revenues. This number was cited so repeatedly that the very clear inference is that the Congress was thinking of disclosure by firms of that size or larger, rather than of requiring disclosure by any firm from which the Council might eventually require quarterly reports. Senator Hathaway said that:

"The impact of public disclosure requirement falls only in areas of great significance to the economy. The restriction to substantial products of firms with \$250 [million] or more in sales or revenues means that in the case of the smallest reporting company, sales of a single product up to \$12.5 million are exempt from disclosure * * *" (119 Daily Cong. Rec. S 5119).

As to the effect of a charge in what the Council might require, the Senators recognized that the amendment was tied to a report of uncertain and changing content. Early in the debates Senator Hathaway put a copy of the proposed Council Form CLC-2, in the Record, and asserted that the form was currently in use (119 Daily Cong. Rec. S 5120-5121), but this misapprehension was cleared up later that day when Senator Saxbe, speaking in opposition to the public disclosure provision, said that:

"The amendment requires that information filed under § 130.21B of the regulations of the Cost of Living Council in effect January 11, 1973 shall be made public. This is an interesting requirement in that the final determination as to what cost information shall be filed and in what detail is not in existence. The Cost of Living Council is still working on the problem as to what information should be filed." (119 Daily Cong. Rec. S 5123).

The Council concludes from the legislative history that the Congress intended the public disclosure provision to apply to firms of \$250 million or more, and that the disclosure provisions apply to the CLC-2's successors, and do not restrict the Council's freedom to determine what information shall be required in its quarterly reports.

The record is simply not conclusive either way in resolving the central issue of whether or not section 205(b), which incorporates a Phase III regulation, survives Phase III and has continued applicability in Phase IV.

The choice must therefore be made between the competing policy alternatives embodied in the statutory language of section 205(a), which restates a long standing Congressional policy of protecting the confidentiality of private commercial information, and that embodied in section 205(b) which articulates the desirability of greater public access to information. The Council has concluded that in this context, a policy of continuing the degree of public disclosure which pertained in Phase III must prevail.

The Council is therefore issuing, in Subpart F, regulations for Phase IV which will effectuate section 205 of the Act. These regulations require disclosure of parts of Form CLC-22 (the Phase IV successor to Form CLC-2), but apply only to firms with annual sales or revenues of \$250 million or more.

These regulations are similar to those issued during Phase III in Subpart F of Part 102, except that references to § 130.21(b) are replaced by references to § 150.1(c) and § 150.161. Section 150.1(c) provides that reports due under Phase III regulations for reporting periods ending before Phase IV, must still be filed, and § 150.161 sets out the Phase IV quarterly reporting requirements. The regulations also specify those parts of Forms CLC-2 and CLC-22 which the Council has determined contain information which is non-proprietary and therefore subject to disclosure in accordance with the procedures of this part. There is no change in the determination of what information on a Form CLC-2 is subject to disclosure.

In consideration of the foregoing, Part 102 of Title 6 of the Code of Federal Regulations is reissued as set forth below, effective August 13, 1973.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473, E.O. 11730, 38 FR 19345, Cost of Living Council Order No. 14, 38 FR 1489)

Issued in Washington, D.C. on August 13, 1973.

JOHN T. DUNLOP,
Director,
Cost of Living Council.

SUBPART A—GENERAL

- Sec.
- 102.1 Purpose and scope.
- 102.2 Definitions.
- 102.3 Authority.
- 102.4 Records not subject to disclosure.
- 102.5 Authentication of records.
- 102.6 Records of other agencies.

SUBPART B—REQUEST FOR RECORDS

- 102.11 Who may file.
- 102.12 Where to file.
- 102.13 Form of request; When to file.

SUBPART C—PROCESSING REQUESTS

- 102.21 Review by the Assistant Director.
- 102.22 Availability of records.

SUBPART D—FEES

- 102.31 Fees.

SUBPART E—APPEALS

- 102.41 Appeals.

SUBPART F—PUBLIC DISCLOSURE OF CLC REPORTS

- 102.51 Purpose and scope.
- 102.52 General rule.
- 102.53 Definitions.
- 102.54 Disclosure procedure.
- 102.55 Form CLC-2 data.
- 102.56 Form CLC-22 data.

SUBPART G—INSPECTION OF INTERNAL REVENUE ECONOMIC STABILIZATION RECORDS

- 102.71 Inspection of Internal Revenue Service stabilization records by Department of the Treasury and Department of Justice.

Authority: Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 14, 38 FR 1489

SUBPART A—GENERAL

§ 102.1 *Purpose and scope.*

This part (a) grants authority to the Assistant Director for Public Affairs of the Cost of Living Council to make records available for public inspection in accordance with the provisions of this part; (b) establishes procedures pursuant to the Freedom of Information Act, 51 Stat. 54, 5 U.S.C. 552 for the public inspection of identifiable records in the custody and control of the Cost of Living Council, except those excluded by the Act; (c) prescribes the time and place at which such records will be made available; and (d) sets the fees to be paid for copies of such records.

§ 102.2 *Definitions.*

In construing the terms used in this part, words and phrases shall be given the meaning ascribed to them in the Administrative Procedure Act, 5 U.S.C. 551, et seq.

§ 102.3 *Authority.*

(a) The Assistant Director for Public Affairs of the Cost of Living Council (hereinafter referred to as the Assistant Director) is hereby delegated the authority to receive, review, identify, determine the availability of, and approve or disapprove requests for records in the custody and control of the Cost of Living Council in accordance with the provisions of this part.

(b) The Assistant Director, in his discretion, is specifically authorized to divulge or disclose to a complainant, or to an individual with specific knowledge of a complaint, the nature and result of the investigation of said complaint in circumstances where no violation has been found.

(c) The Chairman of the Council, or his delegate, is authorized at his discretion to make any record enumerated in § 102.4 available for inspection when he deems disclosure to be in the public interest and disclosure to be in the public interest and disclosure is not otherwise prohibited by law.

§ 102.4 *Records not subject to disclosure.*

This part does not apply to records which are:

(a) Specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy;

(b) Related solely to the internal personnel rules and practices of an agency;

(c) Specifically exempted from disclosure by statute including information which contains or relates to trade secrets or other matters referred to in section 1905 of Title 18 of the United States Code;

(d) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(e) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(f) Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency, and except as authorized in § 102.3 (b);

(g) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(h) Geological and geophysical information and data, including maps concerning wells.

§ 102.5 *Authentication of records.*

(a) The Assistant Director will designate an official custodian who will have authority to attest or otherwise authenticate copies of records made available under the provisions of this part.

(b) The Assistant Director and the official custodian may issue such statements, certificates, or other documents as may be required to show that after a diligent search, no record or entry of the tenor specified in a request has been found to exist. (See Rule 44, Federal Rules of Civil Procedure.)

§ 102.6 *Records of other agencies.*

(a) A person who requests a record originating in another agency but currently in the custody of the Cost of Living Council shall submit his request to the other agency.

(b) Where the originating agency consents, in writing, to make the record available, it will be made available in accordance with the provisions of this part.

SUBPART B—REQUEST FOR RECORDS

§ 102.11 *Who may file.*

Any person may file a request for records.

§ 102.12 *Where to file.*

A request for a record may be filed by mail or in person with the Assistant Director for Public Affairs, Cost of Living Council, 2000 M Street, NW., Washington, D.C. 20508.

§ 102.13 *Form of request; When to file.*

A request for records must be in writing and filed, except on Federal Government holidays, between the hours of 9 a.m. and 5:30 p.m., Monday through Friday.

SUBPART C—PROCESSING REQUESTS

§ 102.21 *Review by the Assistant Director.*

Each request submitted in accordance with §§ 102.10 through 102.12 will be reviewed by the Assistant Director to determine whether the record requested is an identifiable record within the meaning of 5 U.S.C. 552(a)(3).

(a) If the Assistant Director determines that the record is not identifiable, he will advise the person filing the request and give him a reasonable opportunity to provide additional information to facilitate the identification of the record.

(b) If the Assistant Director determines that the record is identifiable but should be withheld from inspection in the public interest, he will inform the person filing the request in writing, of his decision to deny it. The denial shall inform the applicant of:

- (1) The specific subsection of § 102.4 relied on for denying the request; and
- (2) The right to request a review of an adverse determination as provided in § 102.40.

§ 102.22 *Availability of records.*

(a) An identifiable record which has been determined by the Assistant Director to be available for inspection, will be made available for examination in the Office of the Assistant Director.

(b) Manual, typewritten, or other copies may be made freely by the person filing the request subject to appropriate supervision.

SUBPART D—FEES

§ 102.31 *Fees.*

(a) Except as provided in paragraph (b) of this section, there will be no charge for making an identifiable record available pursuant to § 102.21.

(b) If the Assistant Director determines that a record cannot be made available without significant disruption of normal business activities, he may secure an estimate of the cost of making the record available and require the person filing the request to deposit that amount prior to commencing a search for the record. However, if the actual cost of making the record available is significantly more or less than the amount deposited, an adjustment in the form of a supplemental charge or refund, as appropriate, will be made by the Assistant Director.

(c) In determining whether the search for a record will disrupt normal business activities, the Assistant Director may take into account the cumulative

effect upon business activities of all other pending requests for records under this part, whether made by the same person or by other persons.

(d) An available record, upon advance payment of the fee prescribed in any reproduction fee schedule established by the Assistant Director, may be reproduced through any available means; however, the Assistant Director may waive such fees if he determines the reproduction cost to be inconsequential.

SUBPART E—APPEALS

§ 102.41 *Appeals.*

(a) Any person aggrieved by any determination made or action taken by the Assistant Director pursuant to the provisions of this part may request a review.

(b) An appeal must be filed with the Director of the Cost of Living Council within 30 days of the determination or action to be reviewed.

(c) An appeal may be filed in any form and a letter or other written statement setting forth the pertinent facts will be considered sufficient for this purpose.

(d) The Director of the Cost of Living Council may require the person filing the appeal to present additional evidence or information in support of his request for review.

(e) The Director of the Cost of Living Council will promptly review each appeal and notify the appellant in writing, of his decision.

SUBPART F—PUBLIC DISCLOSURE OF CLC REPORTS

§ 102.51 *Purpose and scope.*

(a) The purpose of this subpart is to define, pursuant to section 205(b) (3) of the Economic Stabilization Act of 1970, as amended, what information or data contained in quarterly reports submitted to the Cost of Living Council pursuant to § 150.1(c) or § 150.161 of this title is proprietary in nature and therefore excludable from public disclosure and, conversely, what information or data contained in those quarterly reports is nonproprietary in nature and therefore available to the public.

(b) This subpart applies to:

(1) A business enterprise which

(i) Has annual sales or revenues of \$250 million or more;

(ii) Is subject to the quarterly reporting requirement of § 150.1(c) or § 150.161 of this title; and

(iii) Charges a price for a substantial product which exceeds by more than 1.5 percent the price lawfully in effect for that product on January 10, 1973, or on the date 12 months preceding the end of the quarterly reporting period, whichever is later; and

(2) A Council form submitted pursuant to the quarterly reporting requirement of § 150.1(c) or § 150.161 of this title, and any schedule or supporting information or document attached thereto in accordance with the instructions to the form.

§ 102.52 *General Rule.*

All CLC data determined by this subpart to be proprietary data is excludable from public disclosure. All CLC data determined by this subpart to be nonproprietary data is available to the public.

§ 102.53 *Definitions.*

For the purpose of this subpart—

“Business enterprise” means an “entity” as defined in the Instructions to the Form CLC-2, and to the Form CLC-22.

“CLC data” means any information or data provided on or with a quarterly report submitted to the Cost of Living Council pursuant to § 150.1(c) or § 150.161 of this title when that report is subject to public disclosure pursuant to section 205(b) (1) of the Economic Stabilization Act of 1970 as amended.

“General financial data” means any CLC data, other than trade data, which concerns or relates to the amount or sources of a firm’s income, profits, losses, costs or expenditures.

“Price data” means any CLC data which concerns or relates to a firm’s prices for goods and services.

“SEC data” means any general financial data which cannot currently be excluded from public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15(d) of the Securities and Exchange Act of 1934 by

a firm exclusively engaged in the manufacture or sale of a substantial product as defined in section 205(b) (1) of the Economic Stabilization Act of 1970, as amended.

"Substantial product" means a product, product line, service, or service line, as called for in lines 1-19 of Part VI of the Form CLC-2, and in item 24 of Part VI of the Form CLC-22, or any continuation schedule, in accordance with the instructions to the Form CLC-2, and to the Form CLC-22, which accounted for 5 percent or more of the business enterprise's annual sales or revenues as defined for purposes of the CLC-2 in Part 130 and for purposes of the CLC-22 in Part 150 of this title.

"Trade data" means any CLC data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of a firm.

§ 102.54 *Disclosure Procedure.*

(a) Each business enterprise submitting to the Cost of Living Council a Form CLC-2 or Form CLC-22 which is subject to public disclosure pursuant to section 205(b) (1) of the Economic Stabilization Act of 1970, as amended, shall:

(1) In addition to checking the box provided on the front page of the Form CLC-2 or Form CLC-22 under the heading "Type of Submission" to indicate the submission of a quarterly report, check the box provided for "Other" purpose and in the adjacent space provided, enter the words "Public Disclosure Required";

(2) Attach to the Form CLC-2 or Form CLC-22 a supporting schedule which identifies the substantial product or products which gave rise to the requirements of public disclosure and the weighted average percentage price increase or increases above the weighted average price or prices lawfully in effect on January 10, 1973, charged for those substantial products; and

(3) Attach three copies of the entire CLC-2 or CLC-22 submission which omit all proprietary information or data in accordance with the definitions and rules provided in § 102.55 or § 102.56.

(b) The instructions provided in paragraph (a), above, are in addition to the Instructions to the Form CLC-2 and the Instructions to the Form CLC-22.

(c) Interested persons may examine nonproprietary information or data which a firm furnishes on or with Form CLC-2 or Form CLC-22 reports subject to public disclosure at the key IRS District Office which serves the district in which the firm's corporate headquarters are domiciled.

§ 102.55 *Form CLC-2 data.*

(a) **Form CLC-2 Proper.**

(1) **Part I (Identification Information).**

The information called for in Part I (and in the spaces provided above Part I) serves to identify or describe the firm, the type of filing, the reporting or fiscal periods in question, and the total sales or revenues of the firm for the last fiscal year. All of the information required, other than the annual sales or revenues of the firm, is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere. The annual sales or revenues of the firm (line 5) is proprietary because the Council's special definition of annual sales or revenues results in a figure not disclosed in the SEC Form 10-K.

(2) **Parts II and III (Profit Margin Calculations).**

Except for the calendar entries in line 5 and 7 (nonproprietary data), all general financial data furnished in Parts II and III is based on base period and current period "net sales" and "operating income" as defined by the Cost of Living Council for purposes of Parts II and III. These definitions are not the same as those used for SEC purposes because they exclude revenues from foreign operations, public utilities, farming activities and insurance activities. Since such general financial data, thus more narrowly defined, is not required for SEC purposes, it can be excluded from the public annual reports to the SEC and is, therefore, defined as proprietary data with the exception of the information in line 17. In order to fulfill the general purposes of Section 205 of the Economic Stabilization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the information required in line 17 as nonproprietary CLC data.

(3) **Parts IV and V (Other Information).**

Parts IV and V call for names, titles, addresses and similar non-financial information, including signature and date. Everything required in these parts is nonproprietary data because it does not include either trade data or general

financial data other than SEC data, and is generally available to the public elsewhere.

(4) Part VI (Price/Cost Information). The information required at the top of the page—the name of the firm, the reporting period dates and the cumulative period dates—is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

All of the information required in Columns (a) and (b) on lines 1 through 19 and on any continuation schedule is nonproprietary data because only the names of product lines or service lines and related Standard Industrial Classification Codes is required, which is neither trade data nor general financial data other than SEC data and is generally available to the public elsewhere.

The general financial data required in Columns (c) and (h), lines 1 through 19 (and any continuation schedule) concerns sales by product or service line. Because the CLC definition of "sales" for these columns exclude sales from public utilities activities, foreign operations, insurance activities, farming, exempt items, health service activities, custom products and food operations, the Column (c) or (h) sales entry does not coincide with the equivalent information on the SEC Form 10-K prepared as though the firm were a single-product-line firm. Therefore, the general financial data in Columns (c) and (h) is defined as proprietary data.

The general financial data required in Columns (c) and (h), lines 20 and 21, are sub-totals and totals of the individual sales entries on lines 1-19 and in any continuation schedule. This information has no counterpart on a SEC Form 10-K prepared as though the firm were a single-product-line firm and thus it is defined as proprietary data.

The general financial data required in Columns (c) and (h), lines 23-25, is a breakdown of total sales into sales of or from foreign operations, food sales, and "other nonapplicable sales." These entries have no counterparts on any SEC Form and are, therefore, defined as proprietary data.

The "net sales" information required in Columns (c) and (h), line 26 coincide in scope with the data shown in Part III, line 13 ("net sales"). As explained in the discussion for Parts II and II, this information is proprietary data.

Columns (d), (e), (g) and (i) all call for price data. All information required is, therefore, nonproprietary data.

The data required in Column (f) is a percentage figure representing "cost justification" for each product or service line entered in lines 1-19 and on any continuation schedule for which a price increase is indicated in Column (e). The general financial data required in Column (f), line 22, is the cost justification supporting the weighted average price increase for the combined product or service lines. These are calculations unique to the Form CLC-2 and find no counterpart on the SEC Form 10-K. However, in order to fulfill the general purpose of section 205 of the Economic Stabilization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the data required in Column (f), lines 1-19, inclusive, line 22, and on any continuation schedule, as nonproprietary of CLC data.

(b) Schedule C (Cost Justification).

(1) Part I (Identification Information).

All of the information called for in Part I (and in the spaces provided above Part I) serves to identify or describe the firm, the reporting period, and the product line or SIC Code. All of the information is already defined as nonproprietary in Part I of the Form CLC-2. However, as an administrative convenience, to avoid unnecessary handling and cost of duplication of this portion of the Schedule C which otherwise contains no financial data which is to be available to the public, information required by Part I of Schedule C is defined as proprietary.

(2) Part II (Calculation of Cost Justification).

All of the general financial data called for in Part II, lines 3 through 7, is calculated and entered on the basis of cost per unit of input or output. There are no counterparts for these figures on the SEC 10-K. None of the information required in lines 3 through 7 is SEC data and all of it, therefore, is defined as proprietary data.

The general financial data required in lines 8 through 12 are special CLC calculations which have no counterpart in the SEC 10-K. Therefore, none of the information required is SEC data and all of it is defined as proprietary data.

The same figure that appears on line 11 of Schedule C also appears in Column (f) of Part VI of the Form CLC-2. As explained above, Column (f) information is defined as nonproprietary even though it is general financial data which is not

SEC data. Consistency would normally require that information required by line 11 of Schedule C also be defined as nonproprietary. However, as an administrative convenience, to avoid unnecessary handling and cost of duplication of this portion of the Schedule C which otherwise contains no financial data which is to be available to the public, information required by line 11 of Schedule C is defined as proprietary.

(c) Supporting Information.

Parts of the CLC-2 are required to be submitted as attachments to the CLC-2 proper. Determination of the proprietary nature of information or data shown on these attached Parts is to be made on the same basis as the determination for the equivalent Part on the CLC-2 proper.

Supporting information prepared by the firm in textual or other form other than on a Form provided by the Council must be reviewed on an ad hoc basis to determine whether or not it contains proprietary data. The rules contained in this Subpart shall be used as guidelines for this purpose.

§ 102.56 *Form CLC-22 data.*

(a) Form CLC-22 Proper.

(1) Part I (Identification data).

The information called for in Part I serves to identify or describe the firm, the type of filing, the reporting or fiscal periods in question, and the total sales or revenues of the firm for the last fiscal year. All of the information required, other than the annual sales or revenues of the firm, is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere. The annual sales or revenues of the firm (item 7) is proprietary because the Council's special definition of annual sales or revenues results in a figure not disclosed in the SEC Form 10-K.

(2) Parts II and III (Profit Margin Calculations).

Except for the calendar entries in items 8 and 9 (nonproprietary data), all general financial data furnished in Parts II and III is based on base period and current period "net sales" and "operating income" as defined by the Cost of Living Council for purposes of Parts II and III. These definitions are not the same as those used for SEC purposes because they exclude revenues from foreign operations, public utility operations, insurance operations, agricultural products, and, where required, construction operations. Since such general financial data, thus more narrowly defined, is not required for SEC purposes, it can be excluded from the public annual reports to the SEC and is, therefore, defined as proprietary data with the exception of the information in item 19. In order to fulfill the general purposes of § 205 of the Economic Stabilization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the information required in item 19 as nonproprietary CLC data.

(3) Parts IV and V (Additional Information).

Parts IV and V call for names, titles, addresses, and similar non-financial information, including signature and date. Everything required in these parts is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

(4) Part VI (Price/Cost Information). The information required in items 22 and 23—the name of the firm, and the reporting period dates—is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

All of the information required in Columns (a) and (b) for item 24 and on any continuation schedule is nonproprietary data because only the names of product lines or service lines and related Standard Industrial Classification Codes is required, which is neither trade data nor general financial data other than SEC data and is generally available to the public elsewhere.

The general financial data required in Column (c), item 24 (and any continuation schedule) concerns sales by product line or service line. Because the CLC definition of "sales" for this column excludes sales from public utility operations, foreign operations, insurance operations, agricultural products, and, where required, construction operations, the Column (c) sales entry does not coincide with the equivalent information on the SEC Form 10-K prepared as though the firm were a single-product-line firm. Therefore, the general financial data in Column (c) is defined as proprietary data.

The general financial data required in Column (c), items 25 and 26, are sub-totals and totals of the individual sales entries in item 24 and in any continuation

schedule. This information has no counterpart on a SEC Form 10-K prepared as though the firm were a single-product-line firm and thus it is defined as proprietary data.

The general financial data required in Column (c), items 27-38, is a breakdown of total sales into sales of or from various categories such as public utilities, foreign operations, and custom products. These entries have no counterparts on any SEC Form and are, therefore, defined as proprietary data.

The "Total" sales figure required in Column (c), item 39, coincides in scope with the data shown in Part III, line 15 ("net sales"). As explained in the discussion for Parts II and III, this information is proprietary data.

Column (d) is used only for prenotification purposes and is not filled out when the CLC-22 is used as a quarterly report. Columns (e) and (g) both call for price data. All information required is, therefore, nonproprietary data.

The data required in Column (f) is a percentage figure representing "cost justification" for each product line or service line entered in item 24 and on any continuation schedule for which a price increase is indicated in Column (e). These are calculations unique to the Form CLC-22 and find no counterpart on the SEC Form 10-K. However, in order to fulfill the general purpose of section 205 of the Economic Stabilization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the data required in Column (f), item 24, and on any continuation schedule, as nonproprietary CLC data.

(b) Schedule C (Cost Justification).

(1) Part I (Identification Data).

All of the information called for in Part I serves to identify or describe the firm, the reporting period, the product line, and the SIC Code. All of the information is already defined as nonproprietary in Part I of the Form CLC-22.

(2) Part II (Calculation of Cost Justification).

All of the general financial data called for in Part II, items 4 through 8, is calculated and entered on the basis of cost per unit of input or output. There are no counterparts for these figures on the SEC 10-K. None of the information required in items 4 through 8 is SEC data and all of it, therefore, is defined as proprietary data.

The general financial data required in items 9 through 11 are special CLC calculations which have no counterpart in the SEC 10-K. Therefore, none of the information required is SEC data and all of it is defined as proprietary data.

The same figure that appears on item 12 of Schedule C also appears in Column (f) of Part VI of the Form CLC-22. As explained above, Column (f) information is defined as nonproprietary even though it is general financial data which is not SEC data.

The base cost period and the current cost period are provided in items 13 and 14. This information is nonproprietary.

(c) Supporting Information.

Parts of the CLC-22 are required to be submitted as attachments to the CLC-22 proper. Determination of the proprietary nature of information or data shown on these attached Parts is to be made on the same basis as the determination for the equivalent Part on the CLC-22 proper.

Supporting information prepared by the firm in textual or other form other than on a Form provided by the Council must be reviewed on an ad hoc basis to determine whether or not it contains proprietary data. The rules contained in this Subpart shall be used as guidelines for this purpose.

SUBPART G—INSPECTION OF INTERNAL REVENUE ECONOMIC STABILIZATION RECORDS

§ 102.71 *Inspection of Internal Revenue Service stabilization records by Department of the Treasury and Department of Justice.*

(a) *General.*—Pursuant to the provisions of section 205 of the Economic Stabilization Act of 1970 (Public Law 91-379, 84 Stat. 799), as last amended by the Economic Stabilization Act Amendments of 1972 (Public Law 93-28), officers and employees of the Department of the Treasury (including the Internal Revenue Service and the Office of the Chief Counsel for the Internal Revenue Service) and the Department of Justice whose official duties require inspection of returns made in respect of any tax described in paragraph (a) (2) of § 301.6103(a)-1 of 26 CFR Part 301, or include the administration or enforcement of the provisions of the Economic Stabilization Act of 1970, as amended, may inspect the stabilization records of the Internal Revenue Service without making written application therefore. If the head of a bureau or office in the Department of the Treasury (not a part of the Internal Revenue Service or the Office of Chief

Counsel for the Internal Revenue Service), or the Department of Justice, desires to inspect, or to have an employee of his bureau or office inspect, any such records in connection with some matter officially before him for reasons other than tax administration purposes or the administration or enforcement of the provisions of the Economic Stabilization Act of 1970, as amended, the inspection may, in the discretion of the Secretary of the Treasury or the Commissioner of Internal Revenue or the delegate of either, be permitted upon written application by the head of the bureau or office desiring the inspection. The application shall be made to the Commissioner of Internal Revenue, Washington, D.C. 20224, and shall show the name and address of the person about whom records are to be inspected and the reason why inspection is desired. The information obtained from inspection pursuant to this paragraph may be used as evidence in any proceeding conducted by or before any department or establishment of the United States, or to which the United States is a party.

(b) *Definitions.* (1) *Stabilization records.*—For purposes of this section, the term “stabilization records” includes—

(i) All schedules, lists, written statements, or other written documents filed by or on behalf of any person with the Internal Revenue Service, and

(ii) All other reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to any person and held by the Internal Revenue Service, to the extent any such item is with respect to the administration or enforcement of any provision of the Economic Stabilization Act of 1970, as amended, and is not part of a return (as defined in § 301.6103(a)1(a)(3)(i) of 26 CFR 301.)

(2) *Person.* For purposes of this section, the term “person” has the meaning given to such term under section 7701(a)(1) of the Internal Revenue Code of 1954 (68A Stat. 911; 26 U.S.C. 7701(a)(1)).

[FR Doc. 73-17084 Filed 8-13-73; 3:25 pm]

[From the Federal Register, Nov. 6, 1973]

TITLE 6—ECONOMIC STABILIZATION

CHAPTER I—COST OF LIVING COUNCIL

PART 102—PUBLIC ACCESS TO RECORDS

Public Disclosure of CLC Reports

The purpose of this amendment to the Cost of Living Council's regulations governing public access to its records is to (1) define a business enterprise as a parent and the consolidated and unconsolidated entities which it directly or indirectly controls, (2) require the filing of an additional copy of certain quarterly reports to be used by the Council in responding to requests for public disclosure, (3) provide for the certification that public disclosure of certain quarterly reports is not required because the submitting firm has not increased prices sufficiently to require disclosure, and (4) specify those parts of Schedules F, R, and T which the Council has determined contain information which is nonproprietary and therefore subject to disclosure in accordance with Part 102 of Title 6, Code of Federal Regulations.

Subpart F of Part 102, dealing with public disclosure of the Forms CLC-2 and CLC-22, applies to business enterprises having certain characteristics. Previously, “business enterprise” had been defined in § 102.53 with reference to the instructions to the Form CLC-2 and to the Form CLC-22. Section 102.53 is amended to define business enterprise as a firm is defined in Part 150 of the Economic Stabilization Regulations for purposes of determining tier status.

Under § 102.54(a)(3), a firm required to submit additional copies of its Form CLC-2 or CLC-22 quarterly report omitting all proprietary data must submit three copies. This requirement is being changed to four copies. The additional copy will allow the Council to respond to public disclosure requests at both CLC Headquarters in Washington and the IRS District Offices where the copies are filed.

A new paragraph (d) is being added to § 102.54 providing for a business enterprise having annual sales or revenues of \$250 million or over to certify that its quarterly reports are not subject to public disclosure, when the business enterprise has not increased prices enough to require such disclosure under the terms of § 205(b)(1) of the Economic Stabilization Act of 1970, as amended.

The Council has previously set out in §§ 102.55 and 102.56 an item-by-item listing of the data on Forms CLC-2 and CLC-22 and their related Schedule C's which the Council has determined to be nonproprietary. Similar listings are being added covering related Schedules F (Report or Record of Food Manufacturing Revenues), R (Reconciliation of Forms 10-K, 10-Q or Other Financial Statements to Form CLC-22), and T (Report of Retailing and Wholesaling Markups or Gross Margins).

Because the purpose of these amendments is to make technical corrections and to provide immediate guidance and information with respect to the decisions of the Council, the Council finds that publication in accordance with normal rule-making procedure is impracticable and that good cause exists for making these amendments effective in less than 30 days. Interested persons may submit written comments regarding these regulations. Communications should be addressed to the Office of the General Counsel, Cost of Living Council, 2000 M Street NW., Washington, D.C. 20508.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 14, 38 FR 1489.)

In consideration of the foregoing, Part 102 of Title 6 of the Code of Federal Regulations is amended as set forth herein, effective November 2, 1973.

Issued in Washington, D.C., on November 2, 1973.

JAMES W. McLANE,
Deputy Director,
Cost of Living Council.

1. In § 102.53 the definition of "Business enterprise" is amended to read as follows:

§ 102.53 *Definitions.*

For the purpose of this subpart—

"Business enterprise" means a parent and the consolidated and unconsolidated entities which it directly or indirectly controls, as those terms are defined in § 150.31 of this title.

* * * * *

2. Section 102.54(a) (3) is amended and a new paragraph (d) is added to read as follows:

§ 102.54 *Disclosure procedure.*

(a) * * *

(3) Attach four copies of the entire CLC-2 or CLC-22 submission which omit all proprietary information or data in accordance with the definitions and rules provided in § 102.55 or § 102.56.

* * * * *

(d) Each business enterprise having annual sales or revenues of \$250 million or more and submitting to the Cost of Living Council a Form CLC-2 or Form CLC-22 which is not subject to public disclosure because the business enterprise has not charged a price for a substantial product that exceeds the 1.5 percent limitation specified in § 102.51(b) (1) (iii) shall attach a supporting certification to that effect.

4. Section 102.56 is amended by adding new paragraphs (d), (e), and (f) to read as follows:

§ 102.56 *Form CLC-22 data.*

* * * * *

(d) *Schedule F (Report or Record of Food Manufacturing Revenues).* (1) The information called for in items 1 and 2 serves to identify or describe the firm, the reporting period, and the base period. All of the information is nonproprietary data because it does not include either trade data or general financial data.

(2) (i) Item 3 (Price Rule) Columns (a) and (b) contain nonproprietary data because only the names of product lines and related standard industrial classification codes is required, which is neither trade data nor general financial data other than "SEC data", and is generally available to the public elsewhere.

(ii) Column (c) (Base Revenues) reports the revenues by product line in the base period selected by the firm pursuant to Subpart Q. Generally, the base

period is any 4 consecutive fiscal quarters, at the firm's option, of the eight fiscal quarters which ended prior to May 11, 1973. With respect to slaughtering and manufacturing of meat products, however, the base period is any 4 consecutive fiscal quarter, at the option of the firm concerned, which began after May 25, 1970 and ended before May 11, 1973. These 4-quarter periods are not required to correspond to the fiscal year used on the SEC Form 10-K. In addition, the CLC definition of revenues for Column (c) provides for adjustments to revenues which are not normally reflected in "revenues" for SEC reporting purposes. For example, the CLC definition of "revenues for Column (c) excludes revenues from foreign operations and may exclude revenues derived from food or food raw materials purchased and sold without change in form, and from hedging activities. Therefore, this information has no counterpart on SEC Form 10-K prepared as though the firm were a single-product-line firm and it is defined as proprietary data.

(iii) Column (d) compares the ratio of the current volume to the volume in the base period. This information has no counterpart on a SEC Form 10-K prepared as though the firm were a single-product-line firm and thus it is defined as proprietary data.

(iv) The data required in Column (e) is a percentage figure representing "Cost justification plus 100 percent" for each product line entered in item 3. These are calculations unique to the Schedule F and find no counterpart on the SEC Form 10-K. However, in order to fulfill the general purpose of § 205 of the Economic Stabilization Act of 1970, as amended, and in exercise of the authority granted thereunder, the Council defines the data required in Column (e) of item 3, as nonproprietary CLC data.

(v) Column (f) (Permissible Revenues) is determined by multiplying together the information in Columns (c), (d), and (e). This figure is a special CLC calculation which has no counterpart in the SEC Form 10-K. Therefore, the information required is not SEC data, and is defined as proprietary data.

(vi) Column (g) (Current Revenues) calls for current revenues as defined by the Cost of Living Council. This definition is not the same as that used for SEC purposes, because items bought and sold without change in form must be excluded. Since such general financial data, thus more narrowly prescribed, is not required for SEC purposes, it is defined as proprietary data.

(vii) The data called for in Column (h) (Current Revenues Under (Over)) contains the result of a special CLC calculation which has no counterpart in the SEC Form 10-K. Therefore, the information in Column (h) is not SEC data, and is defined as proprietary data.

(e) *Schedule R. (Reconciliation of Forms 10-K, 10-Q or Other Financial Statements to Form CLC-22.* (1) The information called for in lines 1 and 2 serves to identify the firm and the period of time being reconciled. All of this information is nonproprietary because it does not include either trade data or general financial data.

(2) Lines 3 (Net Sales/Revenues) and 4 (Net Income) contain data reported to the SEC and are therefore nonproprietary.

(3) Lines 5 (Adjustments) and 6 (Intercompany sales/income) are special CLC calculations which have no counterpart in the SEC Form 10-K. Therefore, none of the information required is SEC data and all of it is defined as proprietary data.

(4) Line 7 calls for restatements of lines 3 or 4. Since any such restatement would be a restatement of data otherwise included in a periodic report to the SEC, the restatement is nonproprietary.

(5) Lines 8 (Equity interest in other entities), 9 (Non-operating items), 10 (Income tax expense), and 11 (Extraordinary items) call for data required to be updated to the SEC which is therefore nonproprietary.

(6) Lines 12 (Net sales) and 13 (Operating income) are already defined in Parts II and III of the Form CLC-22 as proprietary data.

(f) *Schedule T (Report of Retailing and Wholesaling Markups or Gross Margins).* (1) The information called for in items 1 through 4 serves to identify the firm, the reporting period, the purpose of the filing, and whether the firm is reporting on customary initial percentage markups, or gross margins. All of the information required is nonproprietary data because it does not include either trade data or general financial data other than SEC data, and is generally available to the public elsewhere.

(2) Item 5 (Schedule of Markups or Gross Margins). The information as to the pricing base period is nonproprietary because it is neither trade data nor general financial data. The information required in Column (a) for item 5 is non-

proprietary data because it is the merchandise or customer categories, which is neither trade data nor general financial data other than SEC data, and is generally available to the public elsewhere.

(3) The information required in Columns (b), (c), (d), (e), (f) (g), and (h), concerns markups or gross margins by merchandise or customer category. This information has no counterpart on a SEC Form 10-K prepared as though the firm was a single-product-line firm and thus it is defined as proprietary data.

(4) Item 6 calls for name, title, address, and telephone number. Everything required in this item is nonproprietary data because it does not include either trade data or general financial data other than SEC data and is generally available to the public elsewhere.

[FR Doc. 73-23730 Filed 11-2-73; 3:56 pm]

[ATTACHMENT 3]

CLC QUESTIONNAIRE No. 1—QUESTIONNAIRE CONCERNING PUBLIC DISCLOSURE UNDER § 205 OF THE ECONOMIC STABILIZATION ACT

Instructions.—This questionnaire must be completed by the firm's Chief Executive Officer or other authorized Executive Officer and returned no later than November 20, 1973 to Office of the General Council, Cost of Living Council, 2000 M Street, N.W., Washington, D.C. 20508, marked "Public Disclosure Questionnaire." Failure to complete and return this questionnaire promptly may constitute a violation of the Economic Stabilization Act.

1. Name of firm_____
2. Last fiscal quarter ended_____
3. Does the firm have annual sales or revenues of \$250 million or more?
Yes ☐
No ☐

["Annual sales or revenues" means the total gross receipts of a firm during its most recently completed fiscal year, from whatever source derived, except that it does not include gross receipts of or from a foreign branch or division of such a firm, or the gross receipts of or from a wholly or partially owned foreign entity such as a corporation, partnership, joint venture, association, trust, or subsidiary, if the gross receipts of such foreign entity, branch, or division are derived primarily from transactions with other foreign firms. A foreign entity, branch, or division is one located outside the several States and the District of Columbia. However, gross receipts of domestic entities from U.S. export sales and from sales to firms in the Commonwealth of Puerto Rico are included in the determination of annual sales or revenue (6 CFR § 150.31).]

4. Was or is the firm required by § 130.21(b) or § 150.161 of the economic stabilization regulations to submit quarterly reports?

Yes ☐
No ☐

[§ 130.21 *Price Reporting Firm; Reporting Requirements.*

(a) A price reporting firm is a firm with annual sales or revenues of \$250 million or more.

(b) Each price reporting firm shall submit quarterly reports to the Council with information on prices, costs, and profits in accordance with regulations issued by the Council.

§ 150.161 *Quarterly Reports.*

(a) *General.* Except as provided in paragraph (b), each price category I and II shall submit quarterly reports to the Cost of Living Council on prices, costs and profits in accordance with forms and instructions issued by the Council.

(b) *Waiver of quarterly reports.* Quarterly reports need not be submitted to the Council by the following firms:

(1) A firm which during its most recent fiscal year derived both (i) 90% or more of its annual sales or revenues from the sale of exempt items or from exempt sales and (ii) less than \$50 million of its annual sales or revenues from the sale or lease of non-exempt items.

(2) A firm which is a nonprofit organization with less than \$50 million derived from transactions in property or services which are not exempt under Subpart D of this part, or otherwise excluded from coverage of this part.

(3) State and local governments.

(4) A firm which has not charged a price for any item above the base price or above the adjusted freeze price, whichever is higher, provided the firm files, for the fiscal quarter, a "Certificate of no price increase" in accordance with the forms and instructions issued by the Cost of Living Council.

(c) *Manner and reporting.* Each quarterly report required under paragraph (a) of this section shall be made in accordance with forms and instructions issued by the Cost of Living Council.]

5. During its last fiscal quarter, did the firm charge a price for a substantial product which exceed by more than 1.5% the price lawfully in effect for that product on January 10, 1973, or on the date 12 months preceding the end of the quarterly reporting period, whichever is later?

Yes ☐

No ☐

["Substantial product" means a product, product line, service, or service line, as called for in lines 1-19 of Part VI of the Form CLC-2, and in item 24 of Part VI of the Form CLC-22, or any continuation schedule, in accordance with the instructions to the Form CLC-2, and to the Form CLC-22, which accounted for 5 percent or more of the business enterprise's annual sales or revenues as defined for purposes of the CLC-2 in Part 130 and for purposes of the CLC-22 in Part 150 of this title (6 CFR § 102.53).]

6. If the answers to questions three through five were affirmative and if, of November 1, 1973, more than 45 days had passed since the end of the firm's last fiscal quarter, has the firm filed either a CLC-2 (for fiscal quarters ending prior to August 13, 1973) or a CLC-22 (for fiscal quarters ending after August 12, 1973) prepared for public disclosure?

Yes ☐

No ☐

7. If the response to question five is negative, the firm must file a CLC-2 or a CLC-22 within 45 days of the end of the fiscal quarter, whichever is later. Failure to file a required report may constitute a violation of the Economic Stabilization Act.

[§ 150.163 *Effect of failure to file or maintain reports or other documents required by or under certain sections of this part.*

(a) If a firm which is required to file a report or other document with the Cost of Living Council pursuant to the provisions of this part or an order issued by the Council does not, within the time limits prescribed, file the report or other document—

(1) The firm may not implement any further price increases including price increases which could otherwise be implemented pursuant to § 150.155 until it has complied with that reporting requirement and has obtained the special approval of the Council;

(2) Except to the extent specifically authorized otherwise by the Council in any case, based upon a written request of the firm concerned citing hardship or inequity, action is suspended on all requests for exception filed by that firm until it has complied with the reporting requirement; and

(3) The Council may, whenever it considers it appropriate under the circumstances, order the firm to reduce any of its prices.

(b) Each day that a firm fails to comply with a reporting requirement pursuant to this part pertaining to reports, or with an order under this part, is considered to constitute a separate violation of this part of that order.

§ 150.21 *Sanctions.*

(a) Whoever willfully violates any order or regulation under this part shall be subject to a fine of not more than \$5,000 for each violation.

(b) Whoever violates any order or regulation under this part shall be subject to a civil penalty of not more than \$2,500 for each violation.]

Subject to the provisions of 18 U.S.C. § 1001, I certify that the answers submitted on this questionnaire are factually correct and in accordance with economic stabilization regulations (Title 6, Code of Federal Regulations).

(Signature)

(Title of Chief Executive Officer or other authorized Executive Officer)

Date

[ATTACHMENT 4]

INSTRUCTIONS FOR THE PREPARATION OF FORM CLC-22

1. In item 2, Part I, Specific Instructions, a sentence is added to "Other" to read as follows:

If the Form CLC-22 is being used as a public disclosure document, enter the words "Public Disclosure Required" and complete the form as required by 6 CFR, Part 102, Subpart F.

2. Part B, General Instructions, is amended to add paragraph 8 to read as follows:

Certification that Public Disclosure Not Required

Any firm as defined in these instructions which has annual sales or revenues of \$250 million or more and which has not charged a price for a substantial product which exceed by more than 1.5% the price lawfully in effect for such product on January 10, 1973, or on the date 12 months preceding the end of the quarterly reporting period whichever is later, must submit as a supporting document to any Form CLC-22 filed as a quarterly report two copies of the following certification:

Certification that Public Disclosure Not Required

I certify that as of (a), (b) and all entities which it controls have not at any time since (c) charged a price for a substantial product which exceeds by more than 1.5% the price lawfully in effect on (d).

Chief Executive Officer (or authorized officer)

The following information is entered in the appropriate blanks of this certification:

(a) the reporting period ending date.

(b) the name of the "parent".

(c) and (d) January 10, 1973, or the date 12 months preceding the reporting period ending date whichever is later.

ATTACHMENTS SUBMITTED BY CLC WITH WRITTEN ANSWERS TO QUESTIONS FROM SENATOR MATHIAS¹

[From the Federal Register, July 20, 1973]

TITLE 6—ECONOMIC STABILIZATION

CHAPTER I—COST OF LIVING COUNCIL

PART 140—COST OF LIVING COUNCIL FREEZE REGULATIONS

Exemption of Providers of Health Services

The purpose of this amendment is to add a new § 140.35 to Part 140 of Title 6, Code of Federal Regulations to exempt institutional and noninstitutional providers of health services from the provisions of the Council's freeze regulations, and to continue the Phase III mandatory controls applicable to providers of health services that are embodied in § 130.61 of Part 130 of this title.

The continuation of Phase III mandatory controls is intended to be an interim measure. New regulations governing providers of health services will be developed and issued as a separate subpart of the forthcoming Phase IV regulations after extensive consultation with the Health Industry Advisory Committee of the Cost of Living Council and other interested health care providers and consumers.

Because the purpose of this amendment is to provide immediate guidance and information with respect to the administration of the Economic Stabilization Program, the Council finds that further notice and procedure thereon is impracticable and that good cause exists for making it effective in less than 30 days. Interested persons may submit communications regarding these regulations. Communications should be addressed to the Office of General Counsel, Cost of Living Council, Washington, D.C. 20508.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11730, 38 FR 19345.)

¹ See page 109 for questions and answers.

In consideration of the foregoing, Subpart D of Part 140 of Chapter 1 of Title 6 of the Code of Federal Regulations is amended as set forth herein, effective July 1, 1973.

Issued in Washington, D.C., July 18, 1973.

JAMES W. McLANE,
Director, Special Freeze Group.

Section 140.35 is added to Part 140 to read as follows:

§ 140.35 *Providers of health services.*

Effective July 1, 1973, institutional and noninstitutional providers of health services are exempt. Providers of health services continue to be subject to the Phase III mandatory controls set forth in § 130.61 of this title.

[F.R. Doc. 73-15025 Filed 7-19-73; 4:30 pm]

PART 150—COST OF LIVING COUNCIL PHASE IV REGULATIONS

The purpose of this amendment is to establish a new Part 150—Cost of Living Council Phase IV Regulations and a new Subpart N therein.

Subpart N is a republication of the June 18, 1973, price regulations applicable to the construction industry, 38 FR 15821. Prior to publication on June 18, there was consultation with numerous contractor's association, user groups, and affected Federal agencies.

The regulations establish several rules applicable to prices charged for construction operations, reaffirm profit margin limitations for construction operations, prescribe reporting requirements for sales, costs, and profits by a firm in the construction industry, and provide a procedure for renegotiation of fixed price construction contracts where wages have been reduced.

Because the purpose of this amendment is to provide immediate guidance and information with respect to the administration of the Economic Stabilization Program, the Council finds that further notice and procedure thereon is impracticable and that good cause exists for making it effective in less than 30 days.

In consideration of the foregoing, Title 6 of the Code of Federal Regulations is amended by establishing a new Part 150 and adding a new Subpart N therein as set forth below, effective August 12, 1973.

Issued in Washington, D.C., July 19, 1973.

WILLIAM N. WALKER,
*Acting Deputy Director,
Cost of Living Council.*

SUBPART N—CONSTRUCTION

- Sec.
150.451 Scope.
150.452 Definitions.
150.453 Prices: Redetermination of contracts in excess of \$500,000.
150.454 Reporting of sales, costs, and profits.
150.455 Prices: Passthrough of allowable costs.
150.456 Profit margin measurement.

AUTHORITY: Economic Stabilization Act of 1970, as amended; Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; EO 11739, 38 FR 19345.)

SUBPART N—CONSTRUCTION INDUSTRY

§ 150.451 *Scope.*

This subpart establishes special rules applicable to prices charged for construction operations in the construction industry. This subpart does not apply to the prices charged by any firm in the construction industry which derives both less than 20 percent of its annual sales or revenues from construction operations and less than \$50 million of annual sales or revenues from construction operations.

§ 150.452 *Definitions.*

For purposes of this subpart, the terms—

(a) "Annual sales or revenues" means the total gross receipts of a firm in the construction industry during its most recent fiscal year, except that it does not include gross receipts or from a foreign branch or division of such a firm, or the gross receipts of or from a wholly or partially owned foreign entity such as a corporation, partnership, joint venture, association, trust, or subsidiary, if the

gross receipts of such foreign entity, branch, or division are derived primarily from transactions with other foreign firms. A foreign entity, branch, or division is one located outside the several States and the District of Columbia. However, gross receipts of domestic entities from U.S. export sales and from sales to firms in the Commonwealth of Puerto Rico are included in the determination of annual sales or revenues. For purposes of this subpart annual sales or revenues shall also include the firm's pro rata share of annual sales and revenues derived from the construction operations of any joint venture of which it is a part.

(b) "Base period" means any one, at the option of the firm concerned, of the following fiscal years: That firm's last three fiscal years ending before August 15, 1971, and any fiscal year, other than the fiscal year for which compliance is being measured, completed on or after that date.

(c) "Construction industry" means every firm engaged in our undertaking any construction operations, and every employee employed by such firm.

(d) "Construction operations" means all work relating to the erecting, construction, altering, remodeling, painting, or decorating of installations such as buildings, bridges, highways, and the like when performed on a contract basis, but shall not include maintenance work performed by workers employed on a permanent basis in a particular plant or facility for the purpose of keeping such plant or facility in efficient operating condition. The term also means the transporting of materials and supplies to or from a particular building or project by the workers of the contractor or subcontractor performing the construction or the manufacturing of materials, supplies, or equipment on the site of a project by such workers. In addition, the term means all other work classified as construction in 29 CFR 5.2(g).

§ 150.453 Prices: Redetermination of contracts in excess of \$500,000.

(a) The contract price for each construction contract in excess of \$500,000, all or part of which is performed by construction workers whose wages and salaries are subject to review by the Construction Industry Stabilization Committee (CISC) or the Cost of Living Council (CLC), shall be redetermined prior to final payment if the wage and salary level of those construction workers is reduced as a result of CISC or CLC action. The amount by which the contract price is reduced as a result of the redetermination must fairly reflect the results of the CISC or CLC action, including any cost increases directly resulting from the CISC or CLC action.

(b) Redetermination of any Federal Government fixed-price prime construction contract in excess of \$500,000 affected by CISC or CLC action shall be conducted in the manner provided in the Federal Procurement Regulations and applicable regulations of the Department of Defense.

(c) Redetermination of fixed-price prime construction contracts in excess of \$500,000 other than those referred to in paragraph (b) of this section shall be conducted in the following manner:

(1) Upon notification of a reduction in the wages and salaries of construction workers subject to CISC or CLC review each subcontractor performing work under the prime contract, whose construction workers have had a reduction of wages and salaries as a result of CISC or CLC action, shall promptly notify the prime contractor of any such reduction, notwithstanding the dollar value of the subcontract.

(2) In the absence of a contract clause relating to redetermination of the contract price, and after notification by his subcontractors of a reduction in the wages and salaries of construction workers as a result of CISC or CLC action, the prime contractor shall offer in writing to redetermine the contract price with the owner or user prior to final payment, and furnish the owner or user with a statement of the estimated number of employees affected by the CISC or CLC action.

(3) The owner or user shall notify the contractor of his intention to jointly redetermine the contract price within 90 days after receipt of the offer referred to in paragraph (c) (2) of this section.

(d) (1) In complying with this section, the prime contractor may require each subcontractor, regardless of tier, to submit to him a statement of the estimated number of employees affected by the results of the CISC or CLC action. The final payment due the subcontractor engaged to perform the subcontracted work shall be jointly redetermined to reflect fairly the results of the CISC or CLC action, including any cost increases directly resulting from such action.

(2) Pending notification by the owner or user of his intent to redetermine the contract price, the prime contractor may place in escrow an amount which fairly

reflects the CISC or CLC action. The prime contractor shall refund to the subcontractor the amount placed in escrow if the owner or user does not indicate to the prime contractor his intention to jointly redetermine the contract price within the 90-day period specified, or if the owner or user does notify the prime contractor during that time period that he will not redetermine the contract price.

§ 150.454 Reporting of sales, costs, and profits.

A firm in the construction industry with annual sales or revenues of \$50 million or more from construction operations shall report annually information as to sales, costs, and profits in accordance with forms and instructions issued by the Council. A firm required to report quarterly under § 150.151 shall not include within the quarterly report sales, costs, and profits information relating to construction operations if the firm is required to report such information annually under the provisions of this section.

§ 150.455 Prices: Passthrough of allowable costs.

A firm in the construction industry may charge prices for construction operations to reflect any allowable costs which it has incurred and continues to incur to the extent that such prices do not result in an increase in its profits margin over that which prevailed during the base period. For purposes of this section, the term "allowable costs" includes the full amount of any pay adjustment contained in a collective-bargaining agreement entered into after November 8, 1971, to the extent such pay adjustment has been approved by CISC or CLC. The full amount of any pay adjustment contained in a collective-bargaining agreement entered into after November 8, 1971, which was approved by the CISC or CLC and passed through prior to June 13, 1973, shall also be considered to be an allowable cost as of the date such pay adjustment was passed through.

§ 150.456 Profit margin measurement.

(a) For purposes of § 150.455 to the extent possible and consistent with the accounting principles customarily used in preparation of the contractor's financial statements, profit margin on construction operations shall be separately determined from profit margin on nonconstruction operations. To the extent that the annual sales or revenues from nonconstruction operations cannot be separated from construction operations for purposes of profit margin determination, those annual sales or revenues from nonconstruction operations are subject to the mandatory profit margin rule of this subpart.

(b) Where annual sales or revenues from nonconstruction operations cannot be separated from the annual sales or revenues from construction operations, the base period to be used in calculating the profit margin shall be the base period defined in § 150.21 and not the base period defined in § 150.452.

(c) No firm in the construction industry may exceed its base period profit margin unless the excess results from factors such as variation in the profit margin caused by the accounting method used on multiyear projects, the manner of accruing losses on multiyear projects, or other factors which are unique to the construction industry and which would distort the comparison of a firm's current profit margin with that which prevailed in its base period.

(d) Any justification for a profit margin exceeding the base period profit margin by a firm subject to § 150.454 which is based on paragraph (c) of this section, shall be reported and be subject to review by the Council.

[FR Doc. 73-15026 Filed 7-19-73 ; 4:30 pm]

COST OF LIVING COUNCIL

[6 CFR Parts 130, and 150]

PHASE IV REGULATIONS

NOTICE OF PROPOSED RULEMAKING

Pursuant to Executive Order 11730, the Cost of Living Council is considering the adoption of the regulations set forth in this notice effective August 12, 1973.

In its initial action in implementing Executive Order 11730, the Council on July 18, 1973, issued a series of amendments to the Freeze regulations providing for Stage A of the transition of the Food industry from the Freeze to Phase IV (38 FR 19462).

Elsewhere in this edition of the FEDERAL REGISTER are amendments to the Economic Stabilization Regulations which provide for returning providers of health services to Phase III controls pending development of Phase IV regulations (38 FR 19462) and providing for the direct transition of the construction industry from the freeze into Phase IV. (38 FR 19462).

In issuing this notice of proposed rulemaking the Council is inviting public price control rules contemplated for Phase IV. Special rules are included dealing with the petroleum and insurance industries. Also included are several technical amendments to existing Phase III Wage Stabilization regulations to adjust them for Phase IV and to accommodate the establishment of separate Price Stabilization regulations.

In the near future, the Council will be issuing procedural regulations covering appeals, requests for exceptions, exemptions and reclassification, hearing procedures, and the disclosure of economic stabilization information. It will also be issuing additional regulations providing for Stage B of the transition of the food industry into Phase IV as well as a recodification of the Phase III wage stabilization regulations, which continue in effect.

Interested persons are invited to participate in the rulemaking by submitting written data, views or arguments with respect to the proposed regulations set forth in this notice, to the Executive Secretariat, Cost of Living Council, 2000 M Street, NW., Washington, D.C. 20508. Comments should be identified with the designation "Proposed "Phase IV Docket" and should be organized so that those dealings with a particular subpart of the proposed regulations are separate from those dealing with other subparts (i.e. on separate pages). At least ten copies should be submitted. All communications received before July 31, 1973, will be considered by the Council before taking final action on the proposed regulations. The proposed regulations contained in this notice may be changed in the light of comments received. All comments received in response to this notice will be available for examination and copying by interested persons at the Cost of Living Council, 2000 M Street NW., Washington, D.C. during the hours of 9:00 a.m. to 5:00 p.m., Monday through Friday. Submissions will be available both before and after the closing date for comments.

SUBPART A—GENERAL

Subpart A provides the scope of the new Part 150. It specifies which of the prior regulations are superseded and which temporarily remain in effect.

Subpart A also provides that reports due under the Phase III regulations continue to be required even though Phase III has ended for most firms.

Subpart A also reiterates the Phase III rule that contract renegotiation provisions which depend for their operation upon the modification or termination of the Economic Stabilization Program are inoperative as inconsistent with the goals of that program.

SUBPART B—DEFINITIONS

Subpart B contains the definitions of general applicability to this part. Definitions which are applicable only to one subpart are placed at the beginning of that Subpart.

SUBPART C—CLASSIFICATIONS

Subpart C classifies all firms as price category I, II or III, based upon the firm's annual sales or revenues. Specifically, a price category I firm is a firm with annual sales or revenues of \$100 million or more. A price category II firm is one with annual sales or revenues of at least \$50 million but less than \$100 million. All others are price category III firms. The terms "firm" and "annual sales or revenues" are carried forward from Phase II and III. Therefore, as in Phase II, for purposes of determining the appropriate price category, a firm must include the annual sales or revenues from the most recently completed fiscal year of each entity it controls, directly or indirectly, as well as its own annual sales or revenues from its most recently completed fiscal year.

SUBPART D—EXEMPTIONS

The purpose of Subpart D is to set forth a list of the items, transactions, and firms exempt from various provisions of the Economic Stabilization Program. The exemptions are the same as those that prevailed during Phase II and III with certain exceptions and modifications as follows:

Section 150.51 includes language to make it explicit that the exemption of a particular item or sale from the rules governing the price that may be charged for the item or sale does not mean that revenues derived can be excluded from a firm's revenues in determining such things as its price category classification or its profit margin.

Items and sales being added to the Phase II and III exemption are (1) brokerage fees for securities and commodities [§ 150.54(i)], (2) certain long-term coal contracts [§ 150.54(n)], (3) lumber and certain wood products [§ 150.54(o)], and (4) public utilities [§ 150.56].

Postal rates are being expressly deleted from the exemptions [§ 150.54(a)].

The exemption for U.S. tanker rates [§ 150.54(k)] is restated to expressly cover tanker rates on all coastwise voyages, not just those "by sea".

The requirements that a vessel be U.S. built, U.S. documented, and U.S. owned are being omitted as unnecessary since all vessels must meet those standards before they can be licensed to engage in the coastwise trade.

In the small businesses exemption the dates for measuring a firm's qualifications are being advanced 15 months to make them more contemporaneous with the Economic Stabilization Program's entry into Phase IV.

SUBPART E—GENERAL RULES

Subpart E sets forth the general pricing rules which, unless otherwise provided, apply in the new Part 150. The general pricing rules are: (1) No one may change a price for an item which exceeds the base price (or other authorized price) for that item; (2) no one may knowingly pay a price which exceeds the base price (or other authorized price) for that item, unless he had no reasonable alternative but to pay that price and he reports the unlawful price to the IRS; and (3) no one may take retaliatory action against another who files or intends to file a violation complaint or otherwise exercises his rights under the Economic Stabilization Program. These rules are virtually the same as those provided in Phase II.

Subpart E also sets forth the pricing rules applicable to firms engaged in manufacturing and service activities. These rules differ from the Phase II pricing rules for manufacturers and service organizations (§§ 300.12 and 300.14) in several respects, including the following:

(1) Prices above base price levels may be changed to recover net allowable cost increases on a dollar-for-dollar basis only. In Phase II, price increases which reflected increases in allowable costs also reflected maintenance of profit margins (subject to the limitation that the firm's overall profit margin could not exceed its base period profit margin).

(2) The antecedent base point for "cost reach-back" purposes has been changed from the date of the last price increase in the item concerned to the fiscal quarter which ended prior to January 11, 1973. This is also the period for calculating base prices under Phase IV. This change will simplify control and reporting of cost justification because henceforth costs will always be measured from the same base point on a cumulative basis, without regard to intervening price increases. A new period for cost accumulation began under the Phase II rules every time the price of an item was increased, with the result that costs were recorded on an incremental basis without a common point of reference.

(3) Subpart E also places a positive obligation upon firms which raise prices above base price levels to reduce prices when, and to the extent that, the costs which support those price increases no longer continue to be incurred. This rule was implicit under Phase II but was not expressly stated in either § 300.12 or § 300.14.

(4) Subpart E continues unchanged the Phase II rule requiring that increases in labor cost be reduced to reflect productivity gains and that the unit cost decrease in nonvariable costs that results from an increase in volume of output be taken into account. However, because construction contractors are subject to special regulations under Subpart N which differ substantially from the applicable Phase II rules, the productivity offset required in Phase II is not required of construction contractors in Phase IV.

Also new in Subpart E is a special pricing rule covering lawful price increases late in Phase II (after the end of the firm's base cost period), price increases under Phase III's general price standard, and price increases lawfully effected during the 1973 freeze. Essentially, this special rule provides that these price increases may continue to be charged after August 12, 1973, at the last price level charged with respect to the item concerned on or before that date. How-

ever, before these prices may be raised again, the entire amount by which the price charged exceeds the base price, including all price-increase increments since the firm's cost base period, must be cost-justified in accordance with the new dollar-for-dollar rule.

(5) Another special pricing rule contained in Subpart E provides that firms which are subject to the prenotification requirement may apply the prenotified percentage price increase authorized under Subpart H to a product line or service line on a weighted average basis. However, where the prenotified percentage price increase authorized is 10 percent or less, the price increase on any one item may not exceed 10 percent, and where the prenotified percentage price increase to be applied is more than 10 percent the price increase on any item may not exceed the prenotified percentage price increase authorized.

(6) Subpart E also contains the same profit margin limitation which was applied in Phase II to firms which raised a price above the base price. The profit margin rule has been restated, however, to more clearly express its purpose and intent.

Under the profit margin rule as now stated, a firm may not exceed its base period profit margin "for the fiscal year in which a price above the base price is charged." This language makes clear that the profit margin test is a fiscal year test. It does not preclude testing profit margin compliance on a quarterly basis, however. As in Phase II, compliance will be tested quarterly in Phase IV on the basis of a projection for the full fiscal year.

The profit margin rule has been restated to eliminate language which limited price increases to those which in addition to being otherwise permissible, did not "result in" a profit margin excess. This language raised the question of whether there was a requirement to establish a causal link between a price increase above base price and an ensuing profit margin excess. Some firms took the position early in Phase II that a profit margin excess actually experienced was not a direct result of price increases above base but was the result of other factors. Other firms interpreted "result in" to loosely mean "end in," with the sense not of any direct causality but merely of outcome or conclusion. The Cost of Living Council has consistently adhered to the position (as did the Price Commission) that the charging of a price in excess of the base price necessarily contributes in some degree to any profit margin excess experienced in the same fiscal year, and that no direct causal relationship need be shown.

To avoid any misinterpretation in Phase IV, the Council has eliminated from the profit margin rule all words which raise a question of causality. The Council has, however, retained the essential sense of the profit margin rule as an indirect or secondary limitation on price increases once a price above base is charged. The profit margin rule now simply states that once a firm has changed a price in excess of the base price it may not exceed its base period profit margin for the fiscal year in which the increased price is charged. Conforming changes have been made in the new Part 150 wherever the profit margin rule is applied.

Under the alternative general price standard of Phase III firms were permitted to raise prices by a weighted annual average of 1.5 percent or less without limitation as to profit margin. Firms which increased prices pursuant to that alternative general price standard and which, as a result, exceed their base period profit margin during Phase IV may be eligible for an exception to application of the profit margin rule.

Subpart E contains a special provision (§ 150.92) covering prices specified in contracts entered into during the 1973 freeze with respect to delivery or performance occurring during Phase IV. A special rule is needed because contracts calling for performance or delivery after the freeze were not subject to the price freeze rules.

The new § 150.92 provides that a contract entered into during the freeze, with respect to any delivery or performance occurring after August 12, 1973, shall be subject to the pricing rules of Phase IV except that no prenotification shall be required with respect to payment which falls due before September 12, 1973. The effect of this regulation is to subject the post-freeze portion of the contract to all of the pricing rules of Phase IV except prenotification during the first month of Phase IV. The regulation does not operate to bar any delivery or performance scheduled to take place during the first month of Phase IV which would have been deferred by operation of the prenotification rule.

SUBPART F—BASE PRICES AND OTHER AUTHORIZED PRICES

Subpart F provides the rules for calculating base prices and other authorized prices. The general rule is that the base price of an item is the average price lawfully charged for the item in transactions with the class of purchaser concerned during the base price period.

The average price is determined by dividing the net sales of the item to the class of purchaser by the quantity of the item sold or leased to the class of purchaser during the base price period. The base period is the last fiscal quarter which ended prior to January 11, 1973. If no transaction occurred during that fiscal quarter with respect to the item and class of purchaser concerned, the base price period is the next preceding fiscal quarter in which such a transaction did occur.

Subpart F provides that temporary special deals and allowances may not be excluded in computing the base price. Subpart F also incorporates the Phase II rule modifying the class of purchaser concept for purposes of vending machine sales.

The rules for determining a base price with respect to new items, and for determining an authorized price with respect to custom products and custom services are similar to those provided in Phase II. An important change is the inclusion of a prenotification requirement with respect to the sale of new items by a firm which derives more than \$10 million annually from the sale or lease of new items. The purpose of this new rule is to provide a better check on whether an item fully qualifies to be treated as a new item and whether the calculation of the base price of the new item fully conforms to the Subpart F rules.

SUBPART G—BASE COST AND CURRENT COST

Subpart G establishes the basic rules for comparing base costs with current costs. Details of actual calculation of net allowable cost increases are provided in the instructions which accompany forms issued pursuant to Subpart H.

The base cost period for an item is the last fiscal quarter which ended before January 11, 1973. The base cost of direct materials and labor is the rate at which those costs were incurred on the last full day of business in the base cost period. The base cost rule for all other costs is the same except that if the base cost cannot reasonably be determined by reference to the rate at which other costs were incurred on the last full day of business in the base cost period, the firm may use the average cost incurred throughout the base cost period with respect to those costs.

The current cost period is the current fiscal quarter for which a quarterly report or record is required to be filed pursuant to Subpart H. However, because prenotification firms must cost-justify price increases whenever they wish to increase prices, the current cost period for prenotification firms is any representative period prior to the date of the prenotification document in which the normal, recurring costs of the firm were incurred.

With respect to costs of direct materials and labor, the current cost is the rate at which those costs were incurred on the last day of the current cost period. With respect to all other costs, the rule is the same except that if current costs cannot be determined by application of that rule the firm may use the average costs incurred throughout the current cost period with respect to those costs.

The base cost period for new items is the fiscal quarter in which the new item concerned was first sold or leased in a transaction with the class of customer concerned.

SUBPART H—PRENOTIFICATION AND RECORDKEEPING

Subpart H imposes prenotification and recordkeeping requirements on firms.

PRENOTIFICATION

Sections 150.151–150.156 set forth the prenotification rules. The general prenotification rule, § 150.151(a), requires that a price category I firm not increase a price above base price with respect to products or services it sells as a manufacturer or service organization until the firm has filed a notice of the proposed price increase with the Council and 30 days have elapsed since the filing of the notice. The pricing rules require that a firm decrease prices which have been increased above base price if the costs upon which the increased price was based later decrease.

The prenotification requirements do not apply to price increases for exempt items, price increases that reflect solely an increase in excise taxes or duties on imports and certain price increases by non-profit organizations. Prices in contracts with the Federal government need not be prenotified. Moreover, a firm may continue to charge a price lawfully charged on August 12, 1973, without prenotifying that price to the Council.

The notice of the proposed price increase must be filed in the form and manner prescribed by the Council, and will be considered to be filed on the date when it is accepted by the Council. The Council will notify the firm in writing of the date of acceptance. The 30-day prenotification period begins with the date when the notice is accepted.

Section 150.154 provides that during the 30-day prenotification period, the Council may issue an order disapproving or modifying a proposed price increase which does not conform to the rules of this part. It may temporarily suspend the running of the 30-day prenotification period of a proposed price increase if it finds additional information is necessary, or that the notice was improperly filed. The Council may defer a price increase in whole or in part if it finds that the price increase is of such magnitude and would have such an impact upon the economy as to be unreasonably inconsistent with the goals of the Economic Stabilization Program.

Any firm whose proposed price increase has been modified, suspended, disapproved or deferred by an order of the Council, may seek reconsideration of the order pursuant to the provisions of Part 105 of this title.

If the Council does not modify, suspend, disapprove or defer the price increase, the firm may, immediately upon expiration of the 30-day prenotification period, implement the proposed price increase. However, if after implementation of the price increase the Council finds that the price increase is inconsistent with the rules of this part, or unreasonably inconsistent with the goals of the Economic Stabilization Program, it may issue an order modifying, deferring, suspending or disapproving the price increase.

A firm may request from the Council a volatile pricing authorization pursuant to § 150.156. Once a firm receives such an authorization, the firm no longer has to prenotify those increases in the price for an item which are based solely upon the increased cost of raw materials or partially processed materials used in the item.

It also provides that a firm which was pricing pursuant to a volatile pricing authorization of the Price Commission may price pursuant to that authorization until it applies for and receives authorization from the Council. However, a firm may not continue to use a volatile pricing authorization of the Price Commission after September 12, 1973.

QUARTERLY AND ANNUAL REPORTS

All price category I and II firms must submit quarterly reports to the Council containing information on prices, costs, and profits in accordance with regulations issued by the Council. The report for the firm's fourth fiscal quarter shall contain information for the entire fiscal year.

Price category III firms must file an annual report with the Council with information on prices, costs and profits.

A firm which fails to file a required report or document is subject to the provisions of § 150.164. Specifically, (1) it may not implement any further price increases until it has complied with the reporting requirements and has obtained special approval of the Council, (2) action is suspended on any exception request filed by the firm, and, (3) the Council may, when appropriate, order the firm to reduce any of its prices.

Section 150.165 requires each firm to keep records (for four years) which are sufficient to demonstrate that the firm is in compliance with the provisions of this part. These records are subject to inspection by an officer or employee of the Internal Revenue Service or the Council.

SUBPART I—ACCOUNTING AND FINANCIAL REPORTING REQUIREMENTS

Subpart I provides information on accounting and financial reporting requirements. These requirements are the same as those found in the Phase II regulations.

When an acquisition or divestiture occurs, accounting information may be restated only in accordance with generally accepted accounting principles consistently applied. This rule requires restatement of prior-year financial state-

ments in the event of acquisition or divestiture accounted for on a pooling of interest basis. Restatement is generally not appropriate when an acquisition or divestiture is accounted for under the purchase method of accounting.

Subpart I also requires firms which are subject to section 13 or 15(d) of the Securities and Exchange Act or which prepare audited annual financial statements to include with each report filed with the Council a report of an independent public accountant.

SUBPART J—SPECIAL RULES

Subpart J sets forth special pricing rules for low profit firms, for firms which sell items subject to seasonal pricing patterns, and for certain marketing and purchasing cooperatives. The low profit rule for wholesalers, retailers, and manufacturers is set forth in § 150.201. That for service organizations is set forth in § 150.202. The rules differ from the Phase II rules in several particulars. Every firm must file certain financial data with the Council for each fiscal year in which it chooses to use the rule. The firm may price under the low profit rule starting 31 days after it has filed this information with the Council, unless the Council during this time suspends or disapproves of the firm's proposed action, or requests additional information. The Council may disapprove use of the low profit rule by a manufacturer, wholesaler, or retailer whose profit margin is at or above the average profit margin of other firms engaged in the same industry. Within 45 days of the close of a fiscal quarter in which a low profit firm which has priced pursuant to the low profit rule achieves its base period profit margin, as computed pursuant to the low profit rule, the firm's use of the low profit rule is terminated, except as to the profit margin acquired by use of the rule.

The seasonal patterns pricing rule, which allows a firm to adjust prices which normally fluctuate in distinct seasonal patterns without regard to allowable cost increases is adopted substantially from Part 140, the freeze regulations. The special price rules applicable to marketing cooperatives and market risk sharing plans and to purchasing cooperatives during Phase II are continued in §§ 150.203 and 150.204 respectively.

SUBPART K—RETAILERS AND WHOLESALERS

The purpose of Subpart K is to set forth rules applicable to all firms that engage in retail or wholesale operations except those dealing in petroleum products. Retail and wholesale firms will be required to classify the items they sell by categories. Price Category I and II firms would be required to submit their merchandise pricing plan (i.e., a list of categories together with certain information concerning the firm's pricing practices) to the Cost of Living Council. Small firms will prepare their plan and retain it at their main office. Once a firm submits, or in the case of a firm under \$50 million finishes preparing its plan, the firm comes out from under the current price freeze and is subject to the rules set forth in § 150.304(b). Under these rules, a firm will be subject to gross margin tests on a quarterly and annual basis on a category-by-category basis and to a firm-wide annual profit margin test.

Within 60 days after receiving them, the Cost of Living Council will review the merchandise pricing plans submitted by the Price Category I and II firms.

The Council will either approve the firm's pricing scheme or, if it found that a firm's list of categories or supporting information was inadequate or that they did not comply with the requirements of the Subpart, the Council will so notify the firm and require it to correct deficiencies. The Council would retain authority to order price rollbacks of increase that may have been improperly instituted by the firm.

Once its plan is approved, a Price Category I or II firm will be routinely monitored by the Council on the basis of quarterly reports submitted by the firm, supplemented by IRS audits. The quarterly reports will show the firm's gross margins for each of its merchandise categories as compared to the gross margins for that category for the firm's base year and for the corresponding fiscal quarter during the base year. Each category gross margin will have to be no greater than the higher of those two base gross margins. A firm's report for its fourth fiscal quarter will also serve as its annual report and will be the basis for determining its compliance with the annual gross margin and profit margin limitations set forth in § 150.304(b) (2) and (3).

Smaller firms will be expected to monitor themselves, subject to audit by the Council or the Internal Revenue Service. They will also be required to submit annual reports similar to the larger firm's quarterly reports.

Under proposed § 150.311, any firm will be allowed once during its fiscal year to carry any category gross margin overage into the succeeding quarter for purposes of offsetting it. To the extent the firm can then offset the overage, it would be excused. In the case of a fourth quarter overage, the overage would be excused if, for the year, the gross margin for the category is within the base annual gross margin for that category.

SUBPART L—PETROLEUM AND PETROLEUM PRODUCTS

Coverage. Subpart L sets forth the proposed Phase IV petroleum regulations which apply to all sales and purchases of crude petroleum (Standard Industrial Classification Code 1311, excluding natural gas), natural gas liquids (Standard Industrial Classification Code 1321), and refined petroleum products (Standard Industrial Classification Code 2911), and to leases of gasoline stations by manufacturers or resellers of retail gasoline to gasoline retailers. The Small Business exemption § 150.60 is amended to provide that no firm which produces, manufactures or sells covered products will qualify for the Small Business exemption.

Retail Sales—Gasoline, Heating Oil and Diesel Fuel. Any person who sells gasoline, No. 2 diesel fuel or No. 2 heating oil to an ultimate consumer may not charge a price above the ceiling price as set forth in § 150.353. The ceiling price is computed as the seller's actual cost of the product on August 12, 1973 (the proposed effective date of this regulation) plus the actual dollar-and-cent markup applied to a retail sale of the same product on January 10, 1973. In cases where the seller has customary price differentials at a single location, based upon such things as volume or cash discounts, there are separate ceiling prices.

Retailers of gasoline and diesel fuel are required to post on each retail pump, the ceiling price and for gasoline, the octane rating.

The Council, with the cooperation of the Internal Revenue Service, will monitor ceiling prices on a continual basis, and make periodic upward adjustments in the ceiling where necessary to reflect higher costs.

Domestic Crude Petroleum. Section 150.354 places a ceiling on the first sale by a producer of domestic crude petroleum and the first sale by a royalty owner of domestic crude petroleum accepted as a royalty payment. The ceiling price is the price posted on May 15, 1973 for each grade of petroleum from each particular field. Ceiling prices will be monitored by the Council with the cooperation of the Internal Revenue Service and the ceiling will be reviewed quarterly by the Council to determine whether it should be adjusted.

The Council recognizes a need to stimulate increased production and is proposing a system which allows increased production (new crude petroleum) from each producing property and an equal amount of the current production (old crude petroleum) to be sold without respect to the ceiling price rule. Adoption of this incentive plan creates a two-tier pricing system for crude oil, which requires posting of two sets of prices, one for "old oil" and one for "new oil." Postings for "old oil" can be no higher than the ceiling price and postings for "new oil" is at the buyer's discretion.

A crude oil producer is required to prorate among all his "old oil" buyers the amount of "old oil" freed from ceiling limitations by the production of a like amounts of "new oil."

During the period for public comment on these prepared regulations the Cost of Living Council will undertake an analysis and obtain statistical information concerning the structure and level of domestic crude oil prices on May 15 and the pattern of the movement of those prices from that date until the date of the freeze on June 13, 1973.

Resellers. The price at which a wholesaler or retailer can resell a product he purchased and resells without substantial change in form is determined pursuant to § 150.355. The price is computed as the reseller's variable cost of the product plus his actual markup applied to that product at that business location on January 10, 1973. Resellers can import crude oil and/or product for resale and also can commingle imported product or crude oil with the same product or crude oil purchased domestically. A reseller is also permitted to commingle like product or crude oil purchased for resale from various sources (foreign and domestic) at the same and at different times. The resale price of commingled product or crude oil is the weighted average cost of the components plus the reseller's actual dollar-and-cent markup. A manufacturer which elects to act in a reseller capacity

can: (1) Physically commingle imported or domestic product purchased for resale under the resellers rule with product it has manufactured domestically, to facilitate transportation and distribution of the purchased product to be resold under the resellers rule; and (2) physically commingle imported or domestic crude oil purchased for resale under the resellers rule with crude oil it has produced or purchased for refining, to facilitate transportation and distribution of the purchased crude oil to be resold under the resellers rule. This rule does not apply to any retail sales of gasoline, heating oil or diesel fuel. Resellers remain subject to the profit margin test.

Manufacturers. Pursuant to the provisions of § 150.35, a manufacturer cannot charge a price which exceeds its May 15, 1973 price based upon customary price differentials, unless: (1) The increase reflected, on a dollar-for-dollar basis, increased costs since May 15, 1973, of imported crude petroleum and petroleum products; or (2) the increase reflected, on a dollar-for-dollar basis, the increased cost of domestic crude petroleum over the ceiling price; or (3) the increase is prenotified to the Cost of Living Council. A manufacturer which imports product and commingles it with the same product it has manufactured domestically can pass on any increase in cost after May 15, 1973, that imported product on a dollar-for-dollar basis as a price increased over the base price for that product. Equal dollar exchanges of crude for crude are also permitted. Manufacturers remain subject to the profit margin test.

Leases. Section 150.357 provides that a gasoline manufacturer which leases real property to a gasoline retailer for use in retailing gasoline cannot increase the rent for that real property in excess of the rent charged for the month of May 1973. In addition, the lessor cannot increase the retailer's obligation to sell petroleum products to a level above that which prevailed for that retailer in the month of May 1973, or impose any operating requirements which are inconsistent with the Economic Stabilization Program, such as increase the retailer's hours of operation.

General requirements. Section 150.361 requires each seller of crude, petroleum products and natural gas liquids to maintain records of base and ceiling prices and make the information available for a customer upon request. Moreover, each seller has to certify in each bill of sale of such products that the price is no higher than authorized under Economic Stabilization Program rules.

Producers. The reporting and recordkeeping requirements are set forth in § 150.362. Each producer of domestic crude petroleum which derives \$50 million or more in annual sales or revenues from sales of covered products is required to prepare and file with the Cost of Living Council, quarterly reports on prices, costs, profits, and production levels.

Each producer which sells "new crude petroleum" without respect to the ceiling prices must report base period production levels (for the year) and corresponding ceiling prices on an initial report and report, on subsequent monthly reports, the quantity and price of "new crude petroleum" and "released old crude petroleum" sold at prices above ceiling prices.

Manufacturers. Each manufacturer of covered products and each retailer or reseller which derives \$50 million or more in annual sales or revenues from the retailing or reselling of covered products must prepare and file with the Cost of Living Council, monthly and quarterly reports on price movements, costs and other related information.

Recordkeepers. Each retailer or reseller of covered products which derives less than \$50 million but more than \$1 million in annual sales or revenues from the retailing or reselling of those products must prepare and maintain at its principal place of business, monthly and quarterly reports on price movements, costs and other related information.

SUBPART M—INSURANCE

The purpose of Subpart M is to set forth rules applicable to rate increases by insurers. In general, it will provide that insurers may charge a price for insurance, in excess of the price in effect on August 12, 1973, only in accordance with rate-making practices, rating plans, or formulas developed under the rules set forth in proposed § 150.403.

Each health insurer that had \$50 million or more of earned premiums and each property-liability insurer that had \$150 million or more of earned premiums during the calendar year preceding the effective date of any rate increase it is proposing is designated as a "prenotifier" and must notify the Cost of Living Council and the State regulatory agency at least 30 days before any proposed increase of 5 percent or greater which affects \$1 million or more in aggregate

annualized premiums under the existing rate, and would be required to certify that the proposed increase conforms to the requirements of the subpart. Such a proposed increase would be reviewed by the appropriate State regulatory agency (acting under agreement with the Cost of Living Council) and acted upon, within 20 days, by certification that the increase does or does not comply with the subpart. The certification will be prima facie evidence of that compliance or non-compliance. The Cost of Living Council could delay the effective date, request further information, suspend all or part of the increase, or limit, refuse, rescind, reduce, or modify the increase. If the Council does not act within 30 days after the date of the filing, the increase could go into effect without its approval.

Each health insurer with \$25 million or more earned premiums and each property-liability insurer with \$50 million or more earned premiums during the calendar year preceding any rate increase proposed by it will be required to file quarterly reports with the Cost of Living Council.

The Cost of Living Council would designate the United States Civil Service Commission as the certifying agency for contracts under the Federal Employees Health Benefits Law.

SUBPART N—CONSTRUCTION

[Issued July 19, 1973, 88 FR 19468].

SUBPART O—[RESERVED FOR PROVIDERS OF HEALTH SERVICES]

SUBPART P—MASS TRANSPORTATION SYSTEMS

The purpose of Subpart P is to require public benefit corporations charged by law or contract with the responsibility of operating a mass transportation facility (the fares of which are not otherwise regulated), to prenotify according to the procedures established in Subpart H for price category I firms. This provision reflects the requirements of section 215 of the Economic Stabilization Act Amendments of 1970, as added by the Economic Stabilization Act Amendments of 1971 (Public Law 92-210).

Pay amendment to Part 130. A new § 130.26 is being added to Part 130 in Subpart B. The new regulation establishes a procedure pursuant to which the Council may require that a proposed or scheduled pay adjustment shall not be put into effect until 30 days after prenotification of such pay adjustment has been received by the Council.

Paragraph (b) provides that prenotification under the regulation may be required under certain specified conditions. Paragraph (c) provides that such prenotification must encompass all pay adjustments for the applicable control year. Paragraph (d) establishes a requirement that the employer serve a copy of such prenotification on the collective bargaining agent, if any, for the affected employee unit. Paragraph (e) establishes the address to which such prenotification must be addressed.

Paragraph (f) of the new regulation provides that prenotification submitted under the regulation shall be made using the Form PB-3, which was originally issued by the Pay Board and which has been retained for use by the Council. In addition, paragraph (f) lists certain supplemental information which must also be submitted. This supplemental information will be used by the Council to better understand and evaluate wage, salary and benefit adjustments as reported on the Form PB-3.

A new paragraph (d) is being added to § 130.34 to exempt, from the scope of the rules respecting wage stabilization, pay adjustments affecting employees of establishment in the lumber industry, as defined by reference to Standard Industrial Classification (SIC) Codes. This action is taken in order to be consistent with action the Council proposes to take in Subpart D of Part 150, respecting price adjustments in the lumber industry.

In consideration of the foregoing it is proposed to amend Title 6, Code of Federal Regulations as set forth below.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11723, 38 FR 15765; Cost of Living Council Order No. 30, 38 FR 16267)

Issued in Washington, D.C., on July 19, 1973.

WILLIAM N. WALKER,
Acting Deputy Director,
Cost of Living Council.

1. Amend Part 150 by adding Subparts A through N and P to read as follows:

PART 150—COST OF LIVING COUNCIL PHASE IV REGULATIONS

SUBPART A—GENERAL

- Sec.
150.1 Scope.
151.2 Procedures and remedies applicable to certain Phase II and Phase III matters.

SUBPART B—DEFINITIONS

- 150.21 Definitions.

SUBPART C—CLASSIFICATIONS

- 150.31 Price Category I Firms.
150.32 Price Category II Firms.
150.33 Price Category III Firms.

SUBPART D—EXEMPTIONS—ITEMS NOT INCLUDED IN COVERAGE

- 150.51 General.
150.52 Agricultural products, seafood products, and raw sugar price adjustments.
150.53 Real estate and insurance premiums.
150.54 Certain price adjustments.
150.55 Miscellaneous.
150.56 Public utilities.
150.60 Small businesses: exemption of firms with 60 or fewer employees.

SUBPART E—GENERAL PRICE RULES

- 150.71 General rules.
150.76 Price rules for manufacturing and service activities.
150.92 Contracts entered into before August 13, 1973.
150.96 Productivity gains.

SUBPART F—BASE PRICES AND OTHER AUTHORIZED PRICES

- 150.101 Scope.
150.102 Sales and leases of products and services.
150.103 Sales and leases of new property and new services.
150.104 Custom products and custom services.

SUBPART G—BASE COST AND CURRENT COST

- 150.131 Scope.
150.132 General rule.
150.133 Base cost.
150.134 Current cost.
150.135 Special rules for new items.

SUBPART H—PRENOTIFICATION AND REPORTING

- 150.151 Prenotification.
150.152 Manner of prenotification.
150.153 Measure of the prenotification period.
150.154 Council action.
150.155 Implementation of price increases.
150.156 Volatility.
150.157 Previous volatility authorizations.
150.161 Quarterly reports.
150.162 Annual reports.
150.163 Additional reports and information.
150.164 Effect of failure to file or maintain reports or other documents required by or under certain sections of this part.
150.165 Records.

SUBPART I—ACCOUNTING AND FINANCIAL REPORTING REQUIREMENTS

- 150.171 Accounting for business combinations.
150.172 Procedures required with respect to certain financial information.

SUBPART J—SPECIAL RULES

- 150.201 Low profit firms: manufacturers, wholesalers, and retailers.
150.202 Low profit firms: certain service organizations.
150.203 Seasonal patterns.
150.204 Marketing cooperatives and market risk-sharing transactions.
150.205 Purchasing cooperatives.
150.206 Stabilization of particular industries and sectors.

SUBPART K—RETAILERS AND WHOLESALERS

- 150.301 Purpose and scope.
150.302 Effective date of applicability to food retailers and wholesalers.
150.303 Definitions.
150.304 General pricing rules.
150.305 Establishment of merchandise categories.
150.306 Merchandise pricing plans; retailers and wholesalers with annual revenues of \$50 million or more.
150.307 Incomplete and nonconforming plans.
150.308 Approved plans.

Sec.

- 150.309 Merchandise pricing plans; retailers and wholesalers with annual revenues of less than \$50 million.
 150.310 Reporting.
 150.311 Repurification of a quarterly violation.
 Appendix A Merchandise Categories Applicable to Retailers and Wholesalers.

SUBPART L—PETROLEUM AND PETROLEUM PRODUCTS

- 150.351 Purpose and scope.
 150.352 Definitions.
 150.353 Ceiling price rule: Retail sales.
 150.354 Ceiling price rule: Crude petroleum.
 150.355 Price rule: Resellers.
 150.356 Price rule: Manufacturers.
 150.357 Price rule: Leases.
 150.358 Ceiling price determination.
 150.359 Base price determination.
 150.360 Base price—new product.
 150.361 Price information and certification.
 150.362 Reports and recordkeeping.

SUBPART M—INSURANCE

- 150.401 Applicability.
 150.402 Definitions.
 150.403 Criteria.
 150.404 Change in rate making formula.
 150.405 Prenotification.
 150.406 Certification by state regulatory agency.
 150.407 Self-certification.
 150.408 Cost of living council actions.
 150.409 Rates for replacement or revised insurance coverages.
 150.410 Insurance rates subject to state laws.
 150.411 Investigation and review of rates.
 150.412 Reporting.
 150.413 Federal Employees Health Benefits Law.
 150.414 Data requirements.
 150.415 Monitoring by health insurers.

SUBPART N—CONSTRUCTION

SUBPART O—HEALTH RESERVED

SUBPART P—MASS TRANSPORTATION SYSTEMS

- 150.551 Purpose and scope.
 150.552 Definition.
 150.553 General rule.

SUBPART A—GENERAL

§ 150.1 Scope.

(a) Except as provided in paragraph (b) of this section and in § 150.2, this part supersedes Parts 130 and 140 of this chapter.

(b) Part 130 of this chapter remains effective with respect to wages and salaries, with respect to sales of food subject to Subpart F of that part, with respect to sales of meat subject to Subpart M of that part, and with respect to providers of health services subject to Subpart G of that part. Part 140 of this chapter remains effective with respect to sales of food.

(c) *Reports due under prior rules.*—Any report required to be filed with the Council under the provisions of Part 130 of this chapter or any rule, order or regulation of the Council in effect on August 12, 1973, for any reporting period which ended on or before that date and which was not filed by that date, shall be filed with the Council in the form and within the time in which it would have been filed pursuant to the provisions of Part 130 of this chapter.

(d) Price renegotiation provisions in contracts, which depend for their operation upon the modification or termination of the Economic Stabilization Program, were previously declared to be inoperative as unreasonably inconsistent with the goals of the Economic Stabilization Program. Such renegotiation provisions continue to be inoperative on the same ground. This part shall not operate to permit:

(1) A retroactive increase in prices for goods or services sold or leased while those prices were subject to past or present provisions of this title, or

(2) A prospective increase in prices under the terms of a contract subject to a decision and order issued at any time pursuant to this title, except to the extent consistent with such decision and order.

(e) This part does not apply to economic transactions which are not prices within the meaning of the Act. Examples of transactions not within the meaning of the Act are:

- (1) State or local income, sales and real estate taxes;
- (2) Workmen's compensation payments;

- (3) Welfare payments ;
- (4) Child support payments ; and
- (5) Alimony payments.

(f) The Council may permit any exceptions, exemptions or reclassifications that it considers appropriate with respect to the requirements prescribed in this part. Requests for exceptions or exemptions from the requirements of this part shall be submitted in accordance with the provisions of Part 105 of this chapter.

(g) This part applies to :

(1) Economic units and transactions in the several States and the District of Columbia ; and

(2) Sales of goods and services by firms in the several States and the District of Columbia to firms in the Commonwealth of Puerto Rico.

§ 150.2 Procedures and remedies applicable to certain Phase II and Phase III matters.

(a) Paragraphs (a) and (b) of § 103.7 of this chapter remain effective with respect to Phase II matters.

(b) The procedures and remedies specified in Subparts E through H of part 140 of this chapter remain in effect with respect to all matters which were subject to that part before August 13, 1973.

SUBPART B—DEFINITIONS

§ 150.21 Definitions.

“Act” means the Economic Stabilization Act of 1970, as amended.

“Allowable cost” means any cost direct or indirect, unless disallowed by the Cost of Living Council.

“Annual sales or revenues” means the total gross receipts of a firm during its most recently completed fiscal year, from whatever source derived, except that it does not include gross receipts of or from a foreign branch or division of such a firm, or the gross receipts of or from a wholly or partially owned foreign entity such as a corporation, partnership, joint venture, association, trust, or subsidiary, if the gross receipts of such foreign entity, branch, or division are derived primarily from transactions with other foreign firms. A foreign entity, branch, or division is one located outside the several States and the District of Columbia. However, gross receipts of domestic entities from U.S. export sales and from sales to firms in the Commonwealth of Puerto Rico are included in the determination of annual sales or revenue.

“Base period” means any two, at the option of the person concerned, of the following fiscal years : That person’s last three fiscal years ending before August 15, 1971 ; and any fiscal year, completed on or after that date except : A fiscal year for which compliance is being measured, and a fiscal year in which the firm exceeded its base period profit margin. In determining a base period for the purpose of computing a profit margin during a base period, a weighted average of its profits during the two years chosen shall be use.

“Base cost” means the base cost as determined pursuant to Subpart G of this part.

“Base cost period” means the base cost period as determined pursuant to Subpart G of this part.

“Base price” means the base price as determined pursuant to Subpart F of this part.

“Base price period” means the base period as determined pursuant to Subpart F of this part.

“Class of purchasers” means purchasers or lessees to whom a person has charged a comparable price for comparable property or service during the base price period pursuant to customary price differentials between those purchasers or lessees and other purchasers or lessees.

“Controlled group” means a controlled group or corporations, as defined in section 1563 (a) of Title 26, United States Code.

“Council” means the Chairman of the Cost of Living Council established by Executive Order 11615 (3 CFR 1971 Comp., p. 199) and continued under the provisions of Executive Order 11695, or his delegate.

“Current cost” means the current cost as determined pursuant to Subpart G of this part.

“Current cost period” means the current cost period determined pursuant to Subpart G of this part.

“Customary price differential” includes a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume,

grade, quality, or location or type of purchaser, or a term or condition of sale or delivery.

"Firm" means any individual, company, corporation, association, estate, partnership, trust, joint-venture, or sole proprietorship or any other entity however organized including charitable, educational, or other eleemosynary institutions, and the Federal government including Federal agencies, departments, corporations and other instrumentalities, and State and local governments. For purposes of this definition, a firm includes any entity listed in the preceding sentence that is part of or is directly or indirectly controlled by the firm. A person will be deemed to control any firm which is controlled directly or indirectly by such person, his spouse, children, grandchildren, or parents. An entity directly or indirectly controlled by any other entity listed in the first sentence of this definition is not a firm. Whenever the Council considers it appropriate, it may treat as a firm any, part, or all of the entities which comprise the firm.

"Fiscal quarter" means the fiscal quarter of the firm to whom a regulation containing the term applies.

"Fiscal year" means the fiscal year of the firm to which a regulation containing the term applies. It is a consecutive 12-month period constituting a taxable year.

"Item" means a product or service unit offered for sale to a class of purchaser.

"Lease" means a contract whereby a person having a legal estate in any personal property conveys a part of his interest to another person in consideration of rent or other compensation, but does not include a license.

"Manufacturer" means that part of a firm engaged in the trade or business of making, fabricating, or assembling a product or commodity by manual labor or machinery for sale and also includes the mining of natural deposits, the production or refining of oil from wells, and the refining of ores.

"Mass transportation system" means a public benefit corporation, with annual sales or revenues in excess of \$10 million, which is charged by law or contract with the responsibility of operating a mass transportation facility or facilities which:

- (a) Serves a Standard Metropolitan Statistical Area (SMSA): and
- (b) Constitutes the sole or principal means of public transportation for that area.

A facility or facilities includes a rapid rail transit, subway, elevated, bus system but does not include school buses or other conveyances used primarily for sight-seeing or chartered for private use.

"Nonprofit organization" or one which is "not operated for profit" is a firm which is defined as a nonprofit organization in section 501(c) and is exempt under section 501(a) of the Internal Revenue Code of 1954, amended.

"Pooling of interests" means a combination of two or more corporations which meets the conditions set forth in Opinion No. 16 of the Accounting Principles Board of the American Institute of Certified Public Accountants (effective date October 31, 1970), 666 Fifth Avenue, New York, N.Y. 10019.

"Prenotification" means notice submitted to the Cost of Living Council pursuant to the provisions of Subpart H of this part.

"Price" means any compensation for the sale or lease of any property or services, and includes rent, commissions, dues, fees, margins, rates, charges, tariffs, fares, or premiums, regardless of form.

"Price increase" means an increase in the unit price of a product or service or a decrease in the quality of substantially the same product or service.

"Product" means an item of personal property offered for sale to another person.

"Product line" means an aggregation of products of the same manufacturer or different manufacturers, substantially similar as to intended function, usage, and structure, which are offered for sale simultaneously, or within the same commercial season by a firm.

"Profit margin" means the ratio that operating income (net sales less cost of sales and less normal and generally recurring costs of business operations, determined before non-operating items, extraordinary items, and income taxes) bears to net sales as reported on the firm's financial statement prepared in accordance with generally accepted accounting principles consistently applied.

"Public utility" means a firm that regularly furnishes the public or a recognized segment of the public with a commodity or service which is of public consequence and need whether or not that firm is under the jurisdiction of a reg-

ulatory agency, including gas, electric, telephone, telegraph, public transportation by vehicle or pipeline, water, and sewage disposal services.

"Real estate with improvements" means land upon which there is a structure, dwelling, or other building. It does not mean land on which roads, water, sewer, or drainage facilities have been constructed.

"Regulatory agency" means any commission, board, or other legal body existing under law which has jurisdiction to regulate prices and services offered by a public utility.

"Rent" means any price for the use of personal property of any description, including any charge no matter how identified in a lease or other agreement, for the use of any property or for any service in connection with the use of leased property.

"Retailer" means that part of a firm engaged in the trade or business of purchasing property and, without substantially changing the form of that property, reselling it to ultimate consumers.

"Retail firm" means a firm whose annual sales or revenues are primarily from the sale of goods to ultimate consumers.

"Sale" includes exchange, transfer, or other disposition in return for valuable consideration.

"Security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights or any financial or net leases as defined in section 163(d)(4)(a) of the Internal Revenue Code of 1954, amended, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing.

"Service" includes any service performed by a firm for a person, other than in an employment relationship, and also includes professional services of any kind and services performed by membership organizations for which dues are charged, and the leasing or licensing of property to another person.

"Service line" means an aggregation of service, of the same service organization or different service organization, substantially similar as to intended function, usage, application, and result, which are offered for sale simultaneously, or within the same commercial season, by a firm.

"Service organization" means that part of a firm engaged in the trade or business of selling or making available services, including professional service organizations, nonprofit organizations, governments, and government agencies or instrumentalities which carry on those activities.

"Spin-off" means the distribution of the controlling stock in a corporation, by another corporation which owned such stock immediately before that distribution, to the shareholders of the distributing corporation without the surrender by those shareholders of stock or securities in the distributor.

"Split-off" means the distribution of the controlling stock in a corporation, by another corporation which owned such stock immediately before that distribution, to the shareholders of the distributing corporation with the surrender by those shareholders of stock or securities in the distributor.

"State and local governments" means the several States and the District of Columbia, a municipality or other political subdivision, authority, commission, board, district, public corporation or other agency or instrumentality of the several States and the District of Columbia and any board, commission, agency, or other instrumentality of a local government.

"Transaction" means an arms-length sale or lease between unrelated persons and is considered to occur at the time and place a binding contract is entered into between the parties.

"United States" means the several States and the District of Columbia.

"Unrelated person" means a person other than a person described in section 267(b) of Title 26, United States Code.

"Wholesaler" means that part of a firm engaged in the trade or business of purchasing property and, without substantially changing the form of that property, reselling it to retailers for resale or to industrial, commercial, institutional, or professional business users.

SUBPART C—CLASSIFICATIONS

§ 150.31 *Price category I firms.*

(a) A price category I firm is a firm with annual sales or revenues of \$100 million or more.

§ 150.32 *Price category II firms.*

(a) A price category II firm is a firm with annual sales or revenues of at least \$50 million but less than \$100 million.

§ 150.33 *Price category III firms.*

(a) A price category III firm is a firm with annual sales or revenue of less than \$50 million.

SUBPART D—EXEMPTIONS

§ 150.51 *General.*

(a) Price adjustments with regard to the items and sales described in §§ 150.52 through 150.56 are exempt from the price adjustment requirements prescribed in this part. However, revenues received from the sale of exempt items or from exempt sales are included in a firm's annual sales or revenues, as defined in § 150.21, for all purposes including determinations of price category classification and profit margins.

(b) Small business firms which meet the qualifications prescribed in § 150.60 are exempt from and not included in the coverage of this part.

§ 150.52 *Agricultural products, seafood products, and raw sugar price adjustments.*

(a) *General.* Subject to paragraph (b) of this section, the sale of agricultural products which retain their original physical form and have not been processed is exempt. Processed agricultural products are products which have been canned, frozen, slaughtered, milled, or otherwise changed in their physical form. Packaging is not considered a processing activity. Examples:

<i>Exempt</i>	<i>Nonexempt</i>
Live cattle, calves, hogs, sheep, and lambs--	Carcasses and meat cuts.
Live poultry-----	
Sheared or pulled wool-----	Wool products.
	Processed and blended honeybutter product.
Mohair -----	
Hay: Bulk, pelleted, cubed, or baled-----	Dehydrated alfalfa meal or alfalfa meal pellets.
Wheat -----	Flour.
Sugar beets and sugar cane-----	Refined sugar.
Maple sap-----	
All seeds for planting-----	Seeds processed for other uses.
Raw coffee bean.	Roasted coffee bean.
	Canned and frozen vegetables.
	Dill pickles.
	Packaged slaw.
	Popped popcorn.
	Mixed feed.
Feed grains including:	Cracked corn.
Corn -----	
Sorghum -----	
Barley -----	Rolled barley.
Oats -----	Rolled oats.
Raw milk-----	Pasteurized milk and processed products, such as butter, cheese, ice cream.
	Frozen, dried, or liquid eggs.
Soybean -----	Soybean meal and oil.
Leaf tobacco -----	Cigarettes and cigars.
Baled cotton, cotton seed, cotton lint-----	Cotton yarn, cottonseed oil, cottonseed meal.
	Frozen french fries, dehydrated potatoes.
Unmilled rice-----	Milled rice.
	Roasted, salted, or otherwise processed nuts.
	Canned or freeze dried mushrooms.
Fresh hops-----	
Stumpage or trees cut from the stump-----	Milled lumber.
	Canned fruit and juices.
	Glazed citrus peel.
	Canned grapes, wine.
	Applesauce.
	Canned prunes and prune juice.
	Canned olives.
Garden plants-----	Floral wreaths.

(b) *Exempt first sales.* (1) Only the first sale by the producer or grower of those agricultural products which are of a type sold for ultimate consumption in their original physical form is exempt. Examples of these products are:

Shell eggs, packaged or loose.	All fresh vegetables and melons including:	All fresh or naturally dried fruits, packaged or not, including:
Raw honeycomb honey.	Tomatoes.	Fresh oranges.
Fresh potatoes, packaged or not.	Lettuce.	Grapes and raisins.
All raw nuts—shelled and unshelled.	Sweet corn.	Apples.
Fresh mushrooms.	Onions.	Peaches.
Fresh mint.	Green beans.	Strawberries.
Dried beans, peas, and lentils.	Cantaloupe.	Grapefruit.
Unpopped popcorn.	Cucumbers.	Pears.
	Cabbage.	Lemons.
	Carrots.	Plums and prunes.
	Watermelons.	Cherries.
	Green peas.	Cranberries.
	Asparagus.	Avocados.
	Pepper.	Blueberries.
	Broccoli.	Apricots.
	Cauliflower.	Tangerines.
	Spinach.	Olives, uncured.
	Green lima beans.	Nectarines.
	Honeydews.	Raspberries.
	Escarole.	Blackberries.
	Garlic.	Figs.
	Artichokes.	Tangelos.
	Eggplant.	Limes.
	Brussels sprouts.	Dates.
	Beets.	Papayas.
		Bananas.
		Pomegranates.
		Currants.
		Persimmons.
		Cut flowers.

(2) The first sale by (i) a producer of broilers or turkeys or (ii) a producer or fisherman of raw seafood products including those which have been shelled, shucked, iced, skinned, scaled, eviscerated, or decapitated is exempt.

(3) The first sale of the following items are exempt:

(i) Mint oil,

(ii) Maple syrup or sugar,

(iii) Dehydrated fruits.

(c) *Raw sugar prices.* Raw sugar price adjustments which are controlled under the Sugar Act of 1948, as amended, are exempt.

§ 150.53 *Real estate and insurance premiums.*

(a) *Real estate.*—(1) *Sales.* The sales price of the following sales of real estate are exempt.

(i) Unimproved real estate.

(ii) Real estate with improvements completed prior to August 15, 1971.

(iii) Real estate with improvements completed on or after August 15, 1971, if—

(A) The sales price is determined after the completion of construction; or

(B) The sales price is determined before the completion of construction and the wage rates estimated by the builder at the time the price is determined are not subsequently reduced by any action under the Economic Stabilization Program.

(2) *Rentals.* All rent charge for the rental of real property, except for rent charged by a gasoline manufacturer for the rental of a retail gasoline station to a retailer of gasoline, are exempt.

(b) *Insurance premiums.* (1) Premiums charged for the following lines of insurance purchased or renewed after November 13, 1971, are exempt.

(i) Reinsurance of all kinds.

(ii) Ocean marine insurance.

(iii) Inland marine insurance on a bid basis applicable to facilities of transportation and communication.

(iv) Life Insurance, annuities, and endowments (including individual and group contracts of: Ordinary and term life insurance, fixed and variable annuities, and endowments of all kinds); but excluding credit life insurance of any kind.

(v) Individually negotiated and rated insurance contracts written in excess of a self-insured retention of at least \$100,000.

(2) Premiums charged for the following sublines of aviation insurance purchased or renewed after September 1, 1972, are exempt:

- (i) Hull insurance.
- (ii) Liability insurance for bodily injury (excluding passenger hazard) caused by an aircraft.
- (iii) Liability insurance for property damage caused by an aircraft.

§ 150.54 *Certain price adjustments.*

(a) *Federal and State and local governments.* (1) Prices charged for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility, (other than postal rates) performed, furnished, provided, granted, prepared, issued, or transferred by any Federal department, agency, or other instrumentality including any wholly owned Government corporations as defined in the Government Corporation Control Act of 1945, as amended, but not including the U.S. Postal Service are exempt.

(2) Prices and fees charged by State and local governments for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, facilities, materials, or similar thing of value or utility performed, furnished, provided, granted, prepared, issued, or transferred including tuition and other charges for schools, colleges, and universities owned or operated by a State and local government, are exempt, except, however, that fees or charges for health services (but not health service fees levied on all students as a condition of enrollment are not exempt under the provisions of this section).

(b) *Tuition fees of private nonprofit educational organizations.* Tuition fees and other charges by private schools, colleges, and universities not operated for profit, are exempt, except that: (1) Fees and charges resulting in income which is subject to tax under Part III of Subchapter F of the Internal Revenue Code of 1954, as amended, as unrelated business taxable income and (2) medical fees and charges, other than a health service fee levied on all students as a condition of enrollment, are not exempt under the provisions of this section.

(c) *Custom products and services.* (1) The prices charged for the following products when custom made to individual order are exempt:

- (i) Leather goods.
- (ii) Wigs and toupees.
- (iii) Fur apparel.
- (iv) Jewelry.

(2) The prices charged for the following custom services when provided to individual order are exempt:

- (i) Tailoring of clothing.
- (ii) Framing of pictures and mirrors.
- (iii) Taxidermy.

(d) *Exports, imports, ocean shipping rates, and foreign air transportation.* (1) The prices charged for export sales including the sale of products to a domestic purchaser who certifies that the product is for export are exempt.

(2) The prices charged for imports, but only the first sale into U.S. commerce are exempt.

(3) The rates charged for international ocean shipping are exempt.

(4) All rates, fares, and charges for foreign air transportation (as defined by the Federal Aviation Act, 49 U.S.C. 1301 (21)) which are set forth in tariffs filed with the Civil Aeronautics Board or which are established or approved by the Civil Aeronautics Board are exempt.

(e) *Damaged and used products.* The prices charged for damaged and used products other than products which have been rebuilt, repackaged, baled, reassembled, or otherwise processed are exempt.

(f) *Government property.* (1) The prices charged for abandoned or confiscated property sold by any Federal agency or State and local government pursuant to authorization of a court are exempt.

(2) Prices charged for property sold by the United States, including lease-sales are exempt.

(g) *Transactions in gold.* Prices charged for transactions in gold on the domestic market under license from the Secretary of the Treasury pursuant to the Gold Reserve Act of 1934 as amended, and regulations issued pursuant thereto are exempt.

(h) *Securities and financial instruments.* (1) Securities as defined in § 150.21 are exempt.

(2) Commercial paper is exempt.

(3) Commodity futures sold on an organized commodities exchange but not including the commodity (unless otherwise exempt) are exempt.

(i) *Brokerage fees.* Brokerage fees, charged for the purchase or sale of securities or commodity futures.

(j) *Fees and charges imposed by Indian Tribal Councils.* Prices charged for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, commodity, or similar thing of value or utility, performed, furnished, sold, leased, provided, granted, prepared, issued, or transferred by any Indian Tribal Council which is formally recognized by a State or the Federal Government are exempt whether or not all or part of a particular transaction takes place on or off Indian Tribal lands.

(k) *U.S. tanker rates.* Rates for the transportation by tank vessels in the coastwise trade are exempt.

(l) *Retail firms, including restaurants.* Price adjustments of retail firms, including restaurants, with annual sales or revenues of less than \$100,000.

(m) *Silver.* Prices charged for (1) commercial grade silver in refining shapes, (2) silver content in ores and dore, (3) silver coins, and (4) other forms of silver sold for manufacturing or professional uses are exempt.

(n) *Long-term coal contracts.* Prices charged for coal under contracts entered into after August 11, 1973, to provide coal over a period of at least eight years to a public utility which is under the jurisdiction of a regulatory agency are exempt.

(o) *Lumber.* Prices charged for lumber or wood products described in the Standard Industrial Classification Manual, 1972 edition, under Industry Code 2411, 2421, 2426, 2429, 2435, 2436, 2439 or 2492, are exempt.

§ 150.55 *Miscellaneous.*

(a) Royalties and other payments from the sale of copyrights, manuscripts, and like materials prepared for publication are exempt.

(b) Dues paid to a nonprofit organization are exempt.

(c) The prices charged for the following items are exempt:

(1) Antiques and art objects including paintings, etchings and sculptures.

(2) Collectors coins and stamps.

(3) Rocks and stone specimens including precious stones and mountings into which precious stones are set.

(4) Handicraft objects.

(d) Price adjustments made by producers or distributors of motion pictures and television productions for motion pictures and television productions are exempt.

§ 150.56 *Public utilities.*

Rate increases for commodities or services provided by a public utility are exempt.

§ 150.60 *Small Businesses: exemption of firms with 60 or fewer employees.*

(a) *Applicability to firms existing on or before March 31, 1973.*

(1) *General.* Subject to the provisions of paragraphs (a) (2) and (3) of this section, any firm, existing on or before March 31, 1973, including a local government, with an average of 60 or fewer employees (determined as provided in paragraph (a) (3) of this section) is exempt from and not included in the coverage of this Part.

(2) *Exemption not applicable.* The exemption provided for in paragraph (a) (1) of this section shall not be applicable to:

(i) A firm which in its fiscal year ending prior to August 12, 1973, had annual sales or revenues of \$50 million or more;

(ii) A firm which on August 12, 1973, was an institutional or noninstitutional provider of health services (as defined in Subpart K of this part);

(iii) A firm which on August 12, 1973, was engaged in construction operations as defined in Subpart N of this part;

(iv) A firm, if the pay adjustments immediately preceding the August 12, 1973, applicable to or affecting 50 percent or more of its employees, were set by a master employment or other employment contract which was negotiated on a joint or association basis or on an industry, area, group, or other similar basis and which covered more than 60 employees;

(v) A firm which is engaged in the business of selling "covered products" as defined in Subpart L of this part.

(3) *Determination of average number of employees.* The average number of employees for firms in existence on or before March 31, 1973, shall be computed by dividing the sum of the number of employees employed in the way periods which included September 30, and December 31, 1972, and March 31, and June 30, 1973, by the number of such pay periods for which any such firm was in existence.

(b) *Applicability to firms coming into existence on or after April 1, 1973.*—

(1) *General.* Subject to the provisions of paragraphs (b) (2) and (3) of this section, price adjustments of any firm coming into existence on or after April 1, 1973, including a local government, with an average of 60 or fewer employees (determined as provided in paragraph (b) (3) of this section) are exempt from and not included in the coverage of this title.

(2) *Exemption not applicable.* The exemption provided for in paragraph (b) (1) of this section shall not be applicable to:

(i) A firm which at any time during its first four calendar quarters after June 30, 1973, had annual sales or revenues of \$50 million or more;

(ii) A firm which at any time during its first four calendar quarters after June 30, 1973, was an institutional or noninstitutional provider of health services as defined in Subpart K of this part;

(iii) A firm which at any time during its first four calendar quarters after June 30, 1973, was engaged in construction operations as defined in Subpart N of this part;

(iv) A firm, if the pay adjustments at any time during its first four calendar quarters after June 30, 1973, applicable to or affecting 50 percent or more of its employees, were set by a master employment or other employment contract which was negotiated on a joint or association basis or on an industry, area, group or other similar basis and which covered more than 60 employees;

(v) A firm which is deemed to have an average of more than 60 employees in any calendar quarter in its first four calendar quarters, including its fourth calendar quarter, after June 30, 1973;

(vi) A firm which is engaged in the business of selling "covered products" as defined in Subpart L of this part.

(3) *Determination of average number of employees.* The average number of employees for firms coming into existence on or after April 1, 1973, shall be computed as follows:

(i) For its first calendar quarter after June 30, 1973, the average number of employees shall be deemed to be 60 or fewer until such time as the number of employees in that first calendar quarter after June 30, 1973, exceeds 60;

(ii) If the firm was deemed to have an average of 60 or fewer employees in the pay period which included the last day of its first calendar quarter after June 30, 1973, it shall be deemed to have 60 or fewer employees during its second calendar quarter after June 30, 1973 ;

(iii) A firm shall compute its average number of employees for its third calendar quarter after June 30, 1973, by dividing by two the sum of the number of employees employed in the pay period which included the last day of its first two calendar quarters after June 30, 1973 ;

(iv) A firm shall compute its average number of employees for its fourth calendar quarter after June 30, 1973, by dividing by three the sum of the number of employees employed in the pay period which included the last day of its first three calendar quarters after June 30, 1973 ; and

(v) If the firm's average number of employees was deemed to be 60 or fewer for its first four calendar quarters after June 30, 1973, its average number of employees shall be permanently established for the purpose of this paragraph by dividing by four the sum of the number of employees employed in the pay period which included the last day of its first four calendar year quarters after June 30, 1973.

(c) *Definitions.* As used in this section—

(1) "Employee" means any person residing in and employed in the several States or the District of Columbia for whom an employer is required to pay taxes imposed pursuant to the Federal Insurance Contributions Act, 1939, as amended, 26 USC 3101 (FICA), and any person otherwise excluded from FICA coverage, who (i) performs services for any firm as an agent-driver, or commission-driver engaged in the distribution of milk for his principals; or (ii) is defined as an "employee" in 26 USC 3121(d).

(2) "Local government" includes any town, village, city, or similar entity which was incorporated by authority of the State and which has and exercises local legislative powers, and any county, town, township, or similar entity which is a

subdivision of the State or county and which possesses and exercises some powers of local self-government; any school district which is an independent governmental unit and any special district classified as an independent governmental unit created for the sole purpose of performing one or more municipal functions. An "independent government unit" is one which meets the criteria for classifying governmental units used by the Department of Commerce, U.S. Bureau of the Census, in the 1967 Census of Governments, "Governmental Organizations," beginning at p. 13.

SUBPART E—GENERAL PRICE RULES

§ 150.71 *General rules.*

(a) Except as otherwise provided in this Part, no firm (including an individual) may charge a price with respect to any sale or lease of an item after August 12, 1973, which exceeds the base price (or other price authorized under this Part) for that item.

(b) No firm (including an individual) may knowingly pay a price with respect to any sale or lease of an item which exceeds the base price (or other price authorized under this part) for that item. However, this paragraph (b) does not apply to the sale or lease of an item to any firm (including an individual) under circumstances of economic or other coercion in which the buyer or lessee, because of his need for that property or service, had no reasonable alternative but to pay the illegal price, and he reports the sale or lease to the Internal Revenue Service for investigation promptly.

(c) No firm (including an individual) may take retaliatory action against any other firm (including an individual) that files or manifests an intent to file a complaint of alleged violation of, or that otherwise exercises any rights conferred by, the Economic Stabilization Act of 1970, as amended, any provision of this part, or any order issued under this part. For the purposes of this paragraph, "retaliatory action" includes any refusal to continue to sell or lease, any reduction in quality, any reduction in quantity of services or products customarily available for sale or lease, any violation of privacy, any form of harassment, or any inducement of others to retaliate.

§ 150.76 *Price rules for manufacturing and service activities.*

(a) *Price increases.* A firm engaged in manufacturing or service activities, or both, may charge a price in excess of the base price of an item only to recover on a dollar-for-dollar basis those net increases in allowable costs that it incurred with respect to that item since the end of the base cost period and which it continues to incur, subject to paragraphs (b) through (f) of this section. A firm engaged in manufacturing or service activities, or both, which is also engaged in wholesaling or retailing, or both, is subject to the requirements of Subpart K of this part with respect to its wholesaling and retailing operations.

(b) *Price reductions.* A price in excess of the base price of an item may continue to be charged only as long as the net increases in allowable cost which support the price in excess of the base price continue to be incurred. Price reductions shall be made whenever and to the extent that a price charged in excess of the base price is no longer supported by those net increases in allowable costs.

(c) *Offset for productivity gains.* Increases in labor costs shall be reduced to reflect productivity gains in accordance with § 150.96.

(d) *Special rule for certain Phase II and Phase III price increases.* Notwithstanding paragraphs (a) and (b) of this section, any price above the base price which was charged—

(1) after the end of the base cost period of the firm concerned and before January 11, 1973 in compliance with applicable Phase II Economic Stabilization Regulations; or

(2) after January 10, 1973, and before June 13, 1973, in compliance with the general price standard set forth in § 130.13 of this chapter; or

(3) after June 12, 1973, and before August 13, 1973, in compliance with Part 140 of the Economic Stabilization Regulations—

may continue to be charged after August 12, 1973, at the last price level charged with respect to the item concerned on or before August 12, 1973. However, that price may be increased after August 12, 1973, only if the full extent of the price charged above base price, including all incremental price increases charged after the base cost period of the firm concerned is cost-justified in accordance with paragraph (a) of this section and all other requirements of that paragraph are met.

(e) *Price increases pursuant to prenotification.* (1) Price category I firms which are subject to the prenotification requirements of Subpart H of this part must comply with those requirements before increasing prices pursuant to this subpart.

(2) Subject to paragraphs (e) (3) and (4) of this section, a firm which is authorized to charge a prenotified percentage price increase pursuant to Subpart H of this part shall apply that percentage price increase to a product line or service line on a weighted average basis (in accordance with instructions which accompany forms issued pursuant to Subpart H of this part) so that the weighted average of all price adjustments in that line does not exceed the prenotified percentage price increase.

(3) In the case of a prenotified percentage price increase authorized under Subpart H of this part which is not more than 10 percent, the price charged for any one item in that line may not exceed 110 percent of the base price of that item.

(4) In the case of a prenotified percentage price increase authorized under Subpart H of this part which is more than 10 percent, the percentage price increase above the base price which may be charged for any one item may not exceed the prenotified percentage price increase authorized under Subpart H of this part.

(f) *Profit margin limitation.* A firm engaged in manufacturing or service activities, or both, which charges a price in excess of the base price may not, for the fiscal year in which a price in excess of the base price is charged, exceed its base period profit margin.

§ 150.92 *Contracts entered into before August 13, 1973.*

The price specified in a contract for the sale of an item entered into after 9:00 p.m. e.s.t., June 12, 1973, and before August 13, 1973, with respect to any delivery or performance occurring after August 12, 1973, shall be subject to this part except that no prenotification shall be required with respect to payments which fall due before September 12, 1973.

§ 150.96 *Productivity gains.*

(a) *Calculation of productivity gains by manufacturers—*(1) *General.* For the purposes of determining whether a price may be increased by any manufacturer under any provision of this part, productivity gains shall be calculated on the basis of the average percentage gain in the applicable industrial category, as set forth in the table in Appendix A to this part. To the extent provided in the table in Appendix A, productivity gains shall be taken into account in the calculation of all price increases during any fiscal year of a manufacturer but only until the full productivity offset, derived from Appendix A and calculated under paragraph (a) (2) of this section, has been used within that fiscal year.

(2) *Calculation.* (i) For the purposes of determining the extent to which a price increase is justified, each manufacturer shall calculate the sum of all of its actual labor costs (of the type required to be included as costs in reporting and prenotification forms issued pursuant to Subpart H of this part, whether or not such forms are required to be filed) as a percentage of sales, and shall multiply that percentage by the average annual rate of productivity gain for the applicable industrial category, as set forth in the table in Appendix A to this part. The result is the productivity gain, stated as a percentage, by which the total cost increase must be reduced in order to be an allowable cost for the purposes of a price increase under this part.

(ii) If the business of the manufacturer extends to more than one industrial category, the average percentage gain in productivity in each category must be weighted in proportion to the ratio which its expected sales (at present prices for the 12-month period following the proposed date of the increase) in each industrial category bears to the total sales for that period affected by the price increase.

(3) *Subsidiaries, etc., not included.* This subparagraph does not apply to a wholesale, retail, service, public utility, insurance, regulated seller of milk or milk products, or health provided subsidiary, division, affiliate, or similar entity that is a part of, or is directly or indirectly controlled by, a manufacturer.

(4) The percentage of unit cost decrease in nonvariable costs that results from an increased volume shall be treated as provided in the instructions which accompany forms issued pursuant to Subpart H of this part. Negative volume may not be shown.

(b) *Calculation of productivity gains by service organizations other than construction contractors.* For the purpose of determining the extent to which a price increase is justified, each service organization other than a construction con-

tractor shall reduce increases in labor costs to reflect productivity gains in accordance with instructions which accompany forms issued pursuant to subpart H of this part.

SUBPART F—BASE PRICE

§ 150.101 *Scope.*

This Subpart sets forth the regulations which apply for determining base prices except as otherwise provided by this part.

§ 150.102 *Sales and leases of products and services.*

(a) *General rule.* The base price with respect to the sale or lease of an item is the average price lawfully charged for the item in transactions with the class of purchaser concerned during the base price period. The base price shall be determined in accordance with this Subpart notwithstanding the fact that the base price so determined may be lower than the price prevailing on May 25, 1970.

(b) *Average price.* The average price is determined by dividing the net sales of that item to that class of purchaser by the quantity of the item sold or leased to that class of purchaser during the base price period.

(c) *Base price period.* The base price period is the fiscal quarter which ended before January 11, 1973. If no transaction occurred during that quarter with respect to the item and class of purchaser concerned, the base price period is the next preceding fiscal quarter in which a transaction occurred with respect to that item and class of purchaser.

(d) *Temporary specials.* Prices charged pursuant to temporary special deals or temporary special allowances may not be excluded in computing the base price of an item. For the purposes of this paragraph, "temporary special deal" includes an offer of free goods, a combination sale, increased quantities, an introductory offer, and a "cents-off" or "price-pack" offer; and "temporary special allowance" includes early shipping, advertising, display buying, and promotional or other similar arrangements.

(e) *Class of purchasers for vending machine sales.* For the purpose of determining the base price with respect to a sale of an item through a vending machine, the term "class of purchaser" with respect to a firm using vending machines includes those purchasers within a marketing pricing area customarily utilized by that firm.

§ 150.103 *Sales and leases of new property and new services.*

(a) *General—new item.* (1) An item is a new item if—

(i) The firm concerned did not produce, sell or lease it in the same or substantially similar form at any time during the 1-year period immediately preceding the first date on which the firm offers it for sale or lease. (A change in appearance, arrangement, or combination does not create a new item. Ordinarily, a change in fashion, style, form or packaging does not create a new item. In the case of a product for lease, a permanent improvement or betterment made to the products, as a part thereof, to increase value or to restore it makes it a new property for purposes of a lease if the cost of the improvement or betterment is greater than \$100 and at least as much as three month's rent for the property); and

(ii) It is substantially different in purpose, function, quality, or technology, or its use or service effects a substantially different result from any other item which the firm concerned currently sells or leases or sold or leased at any time during the 1-year period immediately preceding the first date on which the firm offers it for sale or lease.

(2) *New market.* An item which the firm concerned has previously sold or leased is a new item with respect to its offer or sale to any market to which he did not sell or lease it at any time during sale or lease. For the purposes of the section, a "market" is one or more members of any one of the following groups: wholesalers; retailers; consumers; manufacturers; or service organizations.

(b) *Base price determination.* A firm offering a new item shall determine its base price as follows:

(1) *Manufacturers and Service Organizations—*(i) *Net operating profit markup.* A manufacturer or service organization shall apply the average net operating profit markup it lawfully received on the most nearly similar item it sold or leased to the same market during the base period to the total allowable unit costs of the new item. For the purposes of this subparagraph, "net operating profit markup" means the ratio which the selling price bears to the total allowable unit costs of the item.

(ii) *Average price of comparable property or services.* If the firm concerned did not offer a similar item for sale or lease to a particular market during the base period, the base price for sales or leases to that market shall be the average price received in a substantial number of current transactions in that market by other firms selling or leasing comparable items in the same marketing area.

(iii) *Customary pricing practice.* If the firm concerned did not offer a similar item for sale or lease to a particular market during the base period, and if the new item is not comparable to any items being sold or leased by any firm in current transactions in the same market, the firm may determine the base price by using any customary pricing practice it used during the base period, or, if it did not sell or lease any property or service during that time, it may use any other pricing practice commonly used by other firms engaging in comparable business with the same market.

(2) *Wholesalers and retailers.*—(i) *Gross margin markup.* A retailer or wholesaler shall apply the gross margin currently being charged for products within the category into which the new product falls to the total allowable unit cost of the new property.

(c) *Base prices upon acquisition.* If a legal entity or a component of a legal entity determines a base price pursuant to this Subpart for an item which it sells or leases to a particular market and the entity or component is subsequently acquired by another firm, that item does not become a new item with respect to the same market. The base price of the item with respect to that market remains the base price determined for it by the acquired entity or component unless the acquiring firm sells or leases the same item to the same market. If the acquiring firm sells or leases the same item to the same market, the acquiring firm's base price with respect to the sale or lease of that item to that market shall be the base price with respect to the sale or lease by the acquired entity or component of that item to that market.

(d) *Prenotification of New Items.* A firm subject to the prenotification requirements of § 150.151 which has projected sales and revenues for its current fiscal year of \$10 million or more derived from the sale or lease of new items may not charge a price for a new item until it has provided 30 days prior notice to the Cost of Living Council in the form and manner prescribed by the Council.

§ 150.104 *Custom products and custom services.*

(a) *Definitions.* The following definitions apply in this section:

"Custom product" means a product (other than one specified in § 150.54(c)

(1) specifically produced by a manufacturer to the buyer's or buyers' specifications and not reasonably comparable to any product manufactured at any previous time by the same manufacturer or its predecessors in interest, including any buyer-specified changes or additions to a non-custom product to the extent that they are not reasonably comparable to any charges or additions manufactured, with respect to that non-custom product, at any previous time by the same manufacturer or its predecessors in interest.

"Custom service" means a service (other than one specified in § 150.54(c)

(2)) specifically produced by a service organization to the buyer's or buyers' specifications and not reasonably comparable to any service provided at any previous time by the same service organization or its predecessors in interest, including any buyer-specified changes or additions to a non-custom service, at any previous time by the same service organization or its predecessors in interest.

(b) *Base price.* A manufacturer or service organization may charge a base price for a custom product or service in conformity with its customary pricing practices, if any, which reflect only costs incurred or to be incurred in the manufacture of the product or the furnishing of the service which are allowable as determined under regulations or decisions issued pursuant to the Economic Stabilization Program. However, a firm which charges a price for a custom product or custom service may not, for the fiscal year in which that price is charged, exceed its base period profit margin.

Example 1. Labor costs to be incurred in the making of a custom product were estimated to be \$2,000,000. However, \$200,000 of this estimated cost was found to be nonallowable under regulations or decisions issued pursuant to the Economic Stabilization Program. Therefore, the highest amount of allowable costs for labor that may be included in determining the base price chargeable for the product is \$1,800,000.

Example 2. Labor costs to be incurred in the construction of an office building were estimated to be \$2,000,000. Because of the action of an agency adminis-

tering a part of the Economic Stabilization Program, \$100,000 of this estimated cost was found to be nonallowable because it exceeded wage rates approved under a contract subject to the Program. Pursuant to another action of an agency administering a part of the Economic Stabilization Program, negotiated and approved changes in work rules resulted in an increase in labor costs of \$50,000. Therefore, the highest amount of allowable costs for labor that may be included in determining the base price chargeable for the construction is \$1,950,000.

(c) *Effective date.* This section applies to the determination of base prices for all custom products or services after August 12, 1973, regardless of the date of the contract, if any, under which the item is sold.

SUBPART G—BASE COST AND CURRENT COST

§ 150.131 *Scope.*

This Subpart sets forth the general rules for determining base cost and current cost except as otherwise provided in this part. These general rules are supplemented by instructions which accompany recordkeeping, reporting and prenotification forms issued pursuant to Subpart H of this part.

§ 150.132 *General rule.*

For the purpose of determining whether costs have been incurred which permit the charging of a price in excess of the base price, net allowable costs incurred during the base cost period with respect to the item concerned ("base costs") shall be compared with net allowable costs incurred during the current period with respect to that item ("current costs"). Subject to Subpart E of this part, current costs which exceed base costs may be used to support a price in excess of the base price for the item concerned.

§ 150.133 *Base cost.*

(a) *Base cost period.* The base cost period for an item is the last fiscal quarter which ended before January 11, 1973.

(b) *Direct Materials and Labor.* The base cost with respect to costs of direct materials and labor is the rate at which those costs were incurred on the last full day of business in the base cost period.

(c) *All other costs.* The base cost with respect to all costs other than direct materials costs and labor costs is the rate at which those costs were incurred on the last full day of business in the base cost period. However, if the base cost with respect to all costs other than direct materials costs and labor costs cannot reasonably be determined by the method prescribed in the preceding sentence, that base cost is the average cost incurred throughout the base cost period with respect to those costs as calculated in accordance with instructions which accompany recordkeeping, reporting and prenotification forms issued pursuant to Subpart H of this part.

§ 150.134 *Current cost.*

(a) *Current cost period.* For reporting and recordkeeping purposes, the current cost period is the current fiscal quarter for which a quarterly report or record is required to be filed pursuant to Subpart H of this part. For prenotification purposes, the current cost period is any representative period prior to the current cost closing date in which the normal, recurring costs of the firm were incurred.

(b) *Current cost closing date.* For recordkeeping and reporting purposes, the current cost closing date is the last full day of business in the current fiscal quarter being reported or recorded. For prenotification purposes, the current cost closing date is any date prior to the date of the prenotification document as entered on that document.

(c) *Direct materials and labor.* The current cost with respect to costs of direct materials and labor is the rate at which those costs were incurred on the current cost closing date.

(d) *All other costs.* The current cost with respect to all costs other than costs of direct materials and labor is the rate at which those costs were incurred on the current cost closing date. However, if the current cost with respect to all costs other than direct materials costs and labor costs cannot reasonably be determined by the method prescribed in the preceding sentence, that current cost is the average cost incurred throughout the current cost period with respect to those costs as calculated in accordance with instructions which accompany recordkeeping, reporting and prenotification forms issued pursuant to Subpart H of this part.

§ 150.135 *Special rules for new items.*

(a) *Base cost period.* The base cost period for each new item, as defined in accordance with § 150.103 is the fiscal quarter in which the new item concerned was first sold or leased in a transaction with the class of customer concerned.

(b) *Base cost.* The base cost with respect to each new item is the base cost as determined in accordance with paragraphs (b) and (c) of § 150.133.

(c) *Current cost.* The current cost period, current cost closing date, and current cost for each new item, as defined in accordance with § 150.103, is the current cost period, current cost closing date, and current cost as determined in accordance with § 150.134.

SUBPART H—PRENOTIFICATION AND REPORTING

§ 150.151 *Prenotification.*

(a) *General rule.* Except as provided in paragraph (b) of this section; a price category I firm may not increase a price for any product or service above the base price with respect to a product or service it sells as a manufacturer or service organization until the firm has filed, pursuant to this subpart, a notice of the proposed price increase with the Council and 30 days have elapsed since the filing of the notice.

(b) *Waiver of prenotification.* (1) The following price increases by a price category I firm need not be prenotified—

(i) Price increases for items which are exempt under Subpart D of this part or otherwise excluded from coverage of this title.

(ii) Price increases by a nonprofit organization with less than \$100 million in annual sales or revenues derived from transactions in property or services which are not exempt under Subpart D of this part or otherwise excluded from coverage of this title.

(iii) Any price increase to the extent it reflects solely an increase in excise taxes (including sales and use taxes) or in duties on imports.

(2) The following prices charged by a price category I firm need not be prenotified:

(i) A price in a contract for the purchase of a product or service by an agency of the Federal government, and a price stated in a subcontract under a contract for the purchase of a product or service by an agency of the Federal government.

(ii) A price above base price which a price category I firm may continue to charge after August 12, 1973 pursuant to § 150.76(d).

§ 150.152 *Manner of prenotification.*

The notice of the proposed price increase must be filed in the form and manner prescribed by the Cost of Living Council, and will be considered to be filed on the date when it is accepted by the Council. The Council will notify the firm, in writing, of the date of acceptance. If the information submitted is incomplete or inadequate, the Council will not accept the filing, and will so notify the firm.

§ 150.153 *Measure of prenotification period.*

The 30-day prenotification period will commence on the date of acceptance of the notice by the Council. In any case in which the 30-day period would otherwise end on a Saturday, Sunday or Federal holiday, it will end at the close of the next succeeding workday.

§ 150.154 *Council action.*

During the 30-day prenotification period, the Council may issue an order disapproving, modifying, suspending or deferring a proposed price increase in whole or in part.

(a) The Council may issue an order disapproving or modifying a proposed price increase in whole or in part, if it finds that the proposed price increase does not conform to the rules of this part.

(b) The Council may issue an order temporarily suspending the running of the 30 days prenotification period, of a proposed price increase if it finds additional information is necessary or that the form was improperly filed. The order will remain in effect until the Council notifies the firm in writing that the additional information has been received and accepted.

(c) The Council may issue an order deferring a price increase, in whole or in part, if it finds that the proposed price increase is of such magnitude and would have such an impact upon the economy as to be unreasonably inconsistent with the goals of the Economic Stabilization Program.

§ 150.155 *Implementation of price increases.*

If the Council does not act upon the proposed price increase within the 30-day prenotification period, pursuant to § 150.154, the proposed price increase may be placed in effect immediately upon expiration of the 30-day prenotification period. Failure of the Council to act upon the price increase within the 30-day period does not constitute approval of the price increase and nothing in this part shall be construed to limit the authority of the Council to modify, suspend, disapprove, or defer any such price increase in whole or in part placed into effect after the expiration of the 30-day period if the Council finds that:

- (a) The price increase does not conform to the rules of this part; or
- (b) The price increase is of such magnitude and would have such an impact upon the economy as to be unreasonably inconsistent with the goals of the Economic Stabilization Program.

§ 150.156 *Volatility.*

(a) Subject to paragraphs (b) through (d) of this section, a firm that has customarily priced an item in a manner immediately responsive to frequent and customary market price fluctuations of the raw materials or partially processed products which it uses in that item may, when and to the extent authorized by the Cost of Living Council increase the price of that item to the extent of any significant market price increase of those raw materials or partially processed products, without regard to the prenotification requirements of this Subpart. However, in the case of a price increase based on an increase in the price of a partially processed product, only that part of the increased cost of the partially processed product that is due to an increase in the market price of the raw materials in that product may be used in computing any allowable increase under this paragraph. For the purposes of this paragraph and paragraph (c) of this section "raw materials" include raw agricultural products, raw seafood, and other raw materials used by the firm in preparing an item for which an authorization is sought under this section.

(b) *Limitation.* A firm which increases a price pursuant to an authorization granted under this section shall reduce that price to the extent of any later decrease in cost in accordance with the general rules of this part.

(c) *Notice on invoice.* A firm which increases a price on any partially processed product pursuant to authorization under this section shall indicate on each invoice to its manufacturing and processing customers that part of any cost increase that is due to an increase in the cost of the raw materials used in making the partially processed product.

(d) Until September 12, 1973, a firm which received a volatile pricing authorization from the Price Commission which was in effect on January 10, 1973, with respect to an item shall be deemed to have received authority from the Council to put price adjustments for that item into effect in accordance with the provisions of this section. Effective September 12, 1973, however, a firm may adjust the price of an item pursuant to this section only if it has received a volatile pricing authorization issued by the Council pursuant to paragraph (a) of this section.

§ 150.161 *Quarterly reports.*

(a) *General.* Except as provided in paragraph (b) of this section, each price category I and II firm shall submit quarterly reports to the Cost of Living Council containing information on prices, costs and profits in accordance with regulations issued by the Council.

(b) *Waiver of quarterly reports.* Quarterly reports need not be submitted to the Council by the following firms:

(1) A firm whose total annual sales or revenues are derived from transactions involving goods and services which are exempt under Subpart D, or otherwise excluded from coverage of this title.

(2) A firm which is a nonprofit organization with less than \$50 million derived from transactions in property or services which are not exempt under Subpart D of this part, or otherwise excluded from coverage of this part.

(3) State and local governments.

(c) *Manner of reporting.* Each quarterly report required under paragraph (a) of this section shall be made in accordance with regulations issued by the Cost of Living Council.

§ 150.162 *Annual reports.*

(a) *General.* Each price category III firm shall file an annual report with the Cost of Living Council with information on prices, costs and profits in accordance with regulations issued by the Council.

§ 150.163 *Additional reports and information.*

Whenever the Cost of Living Council considers it necessary for the effective administration of the Economic Stabilization Program, it may order any firm to file special or separate reports, setting forth information relating to the Economic Stabilization Program, in addition to any other reports required by this part.

§ 150.164 *Effect of failure to file or maintain reports or other documents required by or under certain sections of this part.*

(a) If a firm which is required to file a report or other document with the Cost of Living Council pursuant to the provisions of this part or an order issued by the Council does not, within the time limits prescribed, file the report or other document—

(1) The firm may not implement any further price increases including price increases which could otherwise be implemented pursuant to § 150.155 until it has complied with that reporting requirement and has obtained the special approval of the Council.

(2) Except to the extent specifically authorized otherwise by the Council in any case, based upon a written request of the firm concerned citing hardship or inequity, action is suspended on all exceptions filed by that firm until it has complied with the reporting requirement; and

(3) The Council may, whenever it considers it appropriate under the circumstances, order the firm to reduce any of its prices.

(b) Each day that a firm fails to comply with a reporting requirement pursuant to this part pertaining to reports, or an order under this part, is considered to constitute a separate violation of this part or that order.

§ 150.165 *Records.*

(a) *General.* Each firm subject to this part shall keep such records as are sufficient to demonstrate that the prices charged by the firm are in compliance with the rules in this part.

(b) *Inspection.* Records required to be kept under paragraph (a) of this section shall be made available for inspection at any time upon the request of an officer or employee of the Internal Revenue Service or the Council.

(c) *Justification.* Upon the request of an officer or employee of the Internal Revenue Service or the Council any firm which has filed a notice of a proposed price increase or increases a price pursuant to this part, shall:

(1) Specify the records that comply with paragraph (a) of this section; and

(2) Justify that proposed price increase or increased price.

(d) *Period for keeping records.* Each firm required to keep a record under this section shall maintain and preserve that record for at least 4 years after the last day of the calendar year in which the transactions or other events recorded in that record occurred or the property was acquired by that firm whichever is later.

SUBPART I—ACCOUNTING AND FINANCIAL REPORTING REQUIREMENTS

§ 150.171 *Accounting for business combinations.*

When filing a report or other document under this part, accounting information for business combinations may be restated only in accordance with generally accepted account-principles, consistently applied. Restatement of prior accounts is required for certain changes in business combinations accounted for as a pooling of interests and when there has been a spin-off or a split-off to a parent firm's shareholders. Restatement of prior accounts is generally not appropriate when there is an acquisition or divestiture of a business or other property which is otherwise accounted for. Net sales, costs, and expenses of discontinued operations may not be condensed to "one line" in submissions to the Council, but shall be reported and accounted for on the same basis as continuing operations.

§ 150.172 *Procedures required with respect to certain financial information.*

(a) Each person subject to section 13 or 15(d) of the Securities Exchange Act of 1934 and each firm that prepares an audited financial statement on an annual basis shall obtain, for its reports filed with the Council, the services of an independent public accountant to perform the procedures specified in Part 105 of this title. Those procedures are considered to be supplementary to periodic Council examinations for compliance.

(b) This section applies to all filings received by the Council.

SUBPART J—SPECIAL RULES

§ 150.201 *Low profit firms: Manufacturers, wholesalers, and retailers.*

(a) *Definitions.* For purposes of this section—

“Low profit firm” means any firm which did not receive more than 10 percent of its annual sales or revenues from providing services and during its most recently ended fiscal year or during its “alternative fiscal year” computed in accordance with paragraph (c) of this section had:

(1) Net sales of less than \$1 million and a profit margin which was less than 3 percent; or

(2) Net sales of \$1 million or more and a profit margin which was less than the percentage set forth in column B of the table in paragraph (b) of this section, corresponding to the firm’s capital turnover ratio.

“Base period profit margin” of the firm means a profit margin authorized pursuant to this section.

“Covered activities” means any activity other than firming, life insurance, overseas operations or public utility services.

(b) *Table.* For the purposes of this section, the capital turnover ratio is computed by dividing the net sales for the year by the average total capital (long-term debt plus owner’s equity, less investments, the income of which is included in nonoperating income). For the purposes of making calculations under this section, only “covered activities” are included. The average total capital for any fiscal year is computed by adding the outstanding total capital at the beginning of that fiscal year to the outstanding total capital at the end of that fiscal year, and dividing by two:

	Column A Capital Turnover Ratio	Column B Applicable Profit Margin (percent)
Less than 3.4	-----	3.0
3.4 or more, but less than 3.6	-----	2.9
3.6 or more, but less than 3.7	-----	2.8
3.7 or more, but less than 3.8	-----	2.7
3.8 or more, but less than 4.0	-----	2.6
4.0 or more, but less than 4.2	-----	2.5
4.2 or more, but less than 4.3	-----	2.4
4.3 or more, but less than 4.5	-----	2.3
4.5 or more, but less than 4.8	-----	2.2
4.8 or more, but less than 5.0	-----	2.1
5.0 or more, but less than 5.3	-----	2.0
5.3 or more, but less than 5.6	-----	1.9
5.6 or more, but less than 5.9	-----	1.8
5.9 or more, but less than 6.3	-----	1.7
6.3 or more, but less than 6.7	-----	1.6
6.7 or more, but less than 7.1	-----	1.5
7.1 or more, but less than 7.7	-----	1.4
7.7 or more, but less than 8.3	-----	1.3
8.3 or more, but less than 9.1	-----	1.2
9.1 or more, but less than 10.0	-----	1.1
10.0 or more, but less than 11.1	-----	1.0
11.1 or more, but less than 12.5	-----	0.9
12.5 or more, but less than 14.3	-----	0.8
14.3 or more, but less than 16.7	-----	0.7
16.7 or more, but less than 20.0	-----	0.6
20.0 or more, but less than 25.0	-----	0.5
25.0 or more, but less than 33.3	-----	0.4
33.3 or more, but less than 50.0	-----	0.3
50.0 or more	-----	0.2

(c) *Base period low profit-alternative fiscal year.* A firm may compute an average fiscal year for use as an “alternative fiscal year” for the purposes of paragraph (a) of this section by combining and dividing by 2 the net sales and the average total capital, respectively, for any two of that firm’s base period years as defined in Subpart B of this part.

(d) *General.* Notwithstanding Subpart E of this part, but subject to paragraphs (e) and (f) of this section, a low profit firm may after August 12, 1973 increase any of its prices by an amount reasonably calculated to result by the

end of the third fiscal quarter following the fiscal quarter in which the prices are increased in a profit margin that does not exceed the profit margin allowable under this section. For firms covered by paragraph (a) (1) of this section, the allowable profit margin is 3 percent. For firms covered by paragraph (a) (2) of this section, the allowable profit margin is that set forth in Column B of the table in paragraph (b) of this section.

(e) *Price limitations.* A firm in the course of any of its fiscal years in which it operates under this section, may increase the price of any of its products under this section above the price which legally was charged or legally could have been charged on the day before the day on which the firm elected to be subject to this section without regard to cost justification so long as such increase does not result in exceeding the profit margin allowable under this section.

(f) *Pay limitations.* No firm may qualify as a low profit margin firm if, during its current fiscal year, and for as long as it continues to use this section as a basis for further increasing any price, it pays or credits to an officer or employee who is an owner or a relative of an owner of the firm a rate of salary or other compensation or benefit which exceeds the rate of salary or other compensation or benefit it paid or credited to that officer or employee during its most recent fiscal year, plus 5.5 percent for each fiscal year thereafter. For the purposes of this paragraph, the word "owner" means an officer or employee who owns (or is considered to own within the meaning of section 318(a)(1) of the Internal Revenue Code) on any day of the fiscal year concerned, more than 5 percent of the outstanding stock of the firm.

(g) *Reporting.* Each firm before utilizing this section for a fiscal year or part thereof, in addition to complying with the reporting requirements of Subpart H, and before increasing any price under this section, shall furnish to the Council sufficient financial data to support its loss or low profit position. Such a firm may increase prices under this section after 30 days following the date of the receipt of that financial data by the Council unless, during that 30-day period, the Council suspends or disapproves that action or seeks additional information. The Council may disapprove such action for a firm whose profit margin is at or above the average profit margin of other firms engaged in the same industry.

(h) *After achieving allowable profit margin.* Within 45 days after the end of a fiscal quarter in which a loss and low profit firm which has increased prices pursuant to this section achieves its base period profit margin or approaches it within .01 percent at an annual rate, use of this section terminates. Thereafter the firm must conform to the price rules of this part which would be applicable to it if it had not been a loss and low profit firm, except that it must continue to utilize the base period profit margin it acquired pursuant to this section in lieu of its own base period profit margin.

§ 150.202 *Low profit firms: Certain service organizations.*

(a) *Definition.* For the purposes of this section, "low profit firm" means any firm which, during its most recently ended fiscal year, obtained at least 90 percent of its revenues from the furnishing of services, and which—

(1) During its most recently ended fiscal year or during its alternative fiscal year computed in accordance with paragraph (b) of this section, had a profit margin which was less than 1 percent; or

(2) Has estimated, and has prepared supporting documentation that it will have for its current fiscal year, a profit margin of less than 1 percent.

(b) *Base period low profit-alternative fiscal year.* A firm may compute an average fiscal year for use as an alternative fiscal year for the purposes of paragraph (a) of this section by combining and dividing by two the net sales for any two of that firm's base period years.

(c) *General rule.* Notwithstanding any other provision of this part, but subject to paragraphs (d), (e) and (f) of this section, a low profit firm may after August 12, 1973 increase any of its prices by an amount reasonably calculated to result in a profit margin of not to exceed 1 percent by the end of the third fiscal quarter following the fiscal quarter in which the prices are increased.

(d) *Pay Limitations.* No firm may qualify as a low profit firm if, during its current fiscal year, and for as long as it continues to use this section as a basis for further increasing any price, it pays or credits to any of its officers or employees who is an owner or a relative of an owner of the firm a rate of salary or other compensation or benefit which exceeds the rate of salary or other compensation or benefit it paid or credited to that officer or employee during its most recent fiscal year, plus 5.5 percent for each fiscal year thereafter. For the purposes of this paragraph, the word "owner" means an officer or employee who owns (or

is considered to own within the meaning of section 318(a)(1) of the Internal Revenue Code) on any day of the fiscal year concerned, more than 5 percent of the outstanding stock of the firm.

(e) *Reporting.* Each firm before utilizing this section for a fiscal year or part thereof, in addition to complying with the reporting requirements of Subpart H of this part, and before increasing any price under this section, furnish to the Council sufficient financial data to support its loss or low profit position. Such a firm may increase prices under this section after 30 days following the date of the receipt of that financial data by the Council unless, during that 30-day period, the Council suspends or disapproves that action, or seeks additional information.

(f) *After achieving allowable profit margin.* Within 45 days after the end of a fiscal quarter in which a loss and low profit firm which has increased prices pursuant to this section achieves a profit margin of 1 percent or approaches it within .01 percent at an annual rate, use of this section terminates. Thereafter the firm must conform to the price rules of this part which would be applicable to it if it had not been a loss and low profit firm, except that it must continue to utilize the 1 percent profit margin it acquired pursuant to this section in lieu of its own base period profit margin.

§ 151.203 *Seasonal patterns.*

(a) *General.* Notwithstanding any other provision of this part, prices which normally fluctuate in distinct seasonal patterns may be adjusted as prescribed in this section.

(b) *Distinct fluctuation.* Prices must show a large or otherwise distinct fluctuation at a specific, identifiable point in time. The distinct fluctuation must be an established practice that has taken place in each of the 3 years before the date of the contemplated change. New firms may determine their qualifications from those generally prevailing with respect to firms similarly situated, selling or leasing in the same marketing area. If there are not similar firms in the immediate area, qualification may be established by reference to the nearest similar marketing area.

(c) *Time of price fluctuation.* The price fluctuation referred to in paragraph (b) of this section may not take place at a time other than the time at which that fluctuation took place in the preceding year unless the date of the price fluctuation is tied to a specific event such as a previously planned introduction of new models.

(d) *Allowable price.* Subject to paragraph (e) of this section, if the requirements of paragraphs (b) and (c) of this section are met, the maximum price which may be charged by the person concerned is the greater of the following:

(1) The base price determined under Subpart F of this part;

(2) The price authorized pursuant to the provisions of Subpart E or K of this part; or

(3) The price charged by that firm during the first 30 days of the period following the current seasonal price adjustment, or if the season was less than 30 days, during the period of that season. For purposes of paragraph (a) of this section, the price charged during that 30-day period, or the period of the season if less than 30 days, is the weighted average of the prices charged on all transactions during that period.

(e) *Limitation.* Notwithstanding paragraph (d) of this section, a firm which charges a price pursuant to this section, may not exceed its base period profit margin.

(f) *Return to nonseasonable prices.* Each firm that increases a price under this section shall decrease that price at the same date or identifiable point in time as the price was decreased in the previous season. The price shall be decreased to the allowable price for the applicable season, pursuant to paragraph (d) of this section.

§ 151.204 *Marketing cooperatives and market risk-sharing transactions.*

(a) *Applicability.* This section applies to—

(1) Sales of products or services by a marketing cooperative, as defined in paragraph (b) of this section, for its members and for other persons; and

(2) Transactions for the sale of products or services by a seller to a buyer in which the price is set in whole or in substantial part by reference to the buyer's proceeds from the later resale of the product or service, or the sale by that buyer of another product or service into which the initial product or service is processed or made.

(b) *Definitions.* For the purposes of this section "marketing cooperative" means a firm that is organized or operated on a cooperative basis for the purpose of

marketing the products or services of its members and other persons, and turning back to them the proceeds of sales, less expenses, on the basis of either the quality or the value of the products or services furnished by them, or that does not make a profit on the sales for its members, either.

(1) Because the market price obtained is only enough to cover costs and expenses and payment for their products or services, or

(2) Because a later additional payment adjusts the payment for this purpose may be cash or other item of value which qualifies as a "patronage dividend" under section 1388 of the Internal Revenue Code of 1954 (26 USC 1388). A firm is not disqualified from being a marketing co-operative by conducting a portion of its transactions with nonmembers. Each transaction of the kind described in paragraph (a) (2) of this section is a "market risk-sharing transaction" and is considered to bind the buyer and seller of that transaction to a "market risk-sharing agreement". The price which is charged in a market risk-sharing transaction is a "market risk-sharing price". The total proceeds which a firm receives from a marketing cooperative for a product or service which the cooperative markets for that firm is also a "market risk-sharing price".

(c) *General.* A market risk-sharing price, as defined in paragraph (b) of this section, may not exceed the price authorized to be charged under any other provision of this part if the kind of product or service and the kind of transaction concerned are not exempt from the Economic Stabilization Program under Subpart D of this part. If a market risk-sharing price is exempt thereunder, and if that price is one of the costs of another product or service which is not exempt thereunder, the manufacturer, service organization, wholesaler, or retailer for whom such a market risk-sharing price is a cost may charge a price in excess of the base price or the price authorized pursuant to § 150.76(d), or Subpart K of this part, for that other product or service under the same conditions and subject to the same restrictions as would otherwise apply to that person under this part, except that —

(1) If that firm is also a marketing cooperative and charges a price pursuant to this section, the ratio of its operating income to its net sales in the current fiscal year may not exceed the ratio which prevailed during the base period (in computing this ratio the firm may elect to reduce operating income by patronage dividends in both the base period and the current period); and

(2) The costs which are determined by the market risk-sharing plan shall, for the purposes of this part, be considered to be imputed allowable costs.

(d) *Imputed allowable costs.* The imputed allowable cost shall be:

(1) Any price that is published or otherwise documented as prevailing in the trade and which the firm has customarily used in establishing a payment at the time of delivery of the product or service, or in determining pool interest in deliveries of the product or service; or if none,

(2) The average documented price paid by competitors for the same product or service in transactions that are not by the marketing cooperative or are not market risk-sharing transactions in the same marketing area, or, if no significant number of those transactions are occurring in the same marketing area, in the closest substantially similar marketing area; or if none,

(3) The published price of the same product or service under Federal Government marketing orders, commodity market quotations, or Department of Agriculture support programs, State or Federal marketing orders, commodity market quotations, or Department of Agricultural Market News Service Reports which ever is most commonly used in the trade as an indicator of current commercial market prices; or if none,

(4) The published price or average documented price paid by competitors for a related product or service that has a similar price pattern in the same marketing area, or in the closest substantially similar marketing area.

§ 151.205 *Purchasing cooperatives.*

(a) *Applicability.* This section applies to sales of products or services by a purchasing cooperative, as defined in paragraph (b) of this section to its members and to other persons.

(b) *Definitions.* For the purposes of this section "purchasing cooperative" means a firm that is organized or operated on a cooperative basis for the purpose of purchasing or manufacturing products or services for its members and other persons at cost, plus expenses, or that does not make a profit on sales to its members, either because the initial price charged is only enough to cover costs and expenses or because a later refund reduces the net price to such an amount. A refund for this purpose may be cash or other item of value which qualifies as

a "patronage dividend" under section 1388 of the Internal Revenue Code of 1954 (26 USC 1388). A firm is not disqualified from being a purchasing cooperative by conducting a portion of its transactions with nonmembers.

(c) *General.* A purchasing cooperative may charge any price for a product or service it sells to its members or other persons, except that a firm which prices pursuant to this section, the ratio of its operating income to its net sales in the current fiscal year, may not exceed the ratio that prevailed during the base period (in computing this ratio the firm may elect to reduce operating income by patronage dividend in both the base period and the current period).

(d) *Exceptions.* A purchasing cooperative that sells a product to its members or other persons primarily for their resale and not for their use or consumption shall charge a price in accordance with its allowable costs or gross margins for the item's merchandise category. In computing its ratio of operating income to net sales a purchasing cooperative may not use the election authorized in paragraph (c) of this section for patronage dividends. The provisions of this paragraph do not apply to a sale made by a purchasing cooperative operating under the Agricultural Marketing Act of 1929, as amended (12 U.S.C. 1141(j)), to a member or other person of that cooperative who is also a cooperative and only resells to its members or other persons for their use or consumption.

§ 150.206 *Stabilization of particular industries and sectors.*

(a) Whenever the Council finds it necessary to achieve the goals of the Economic Stabilization Program, it may issue regulations providing for the stabilization of prices in a particular industry, sector of the economy or part thereof.

(b) The Council may order public hearings with respect to the regulations issued or to be issued pursuant to paragraph (a) of this section if the Council determines that public hearings would aid in achieving the goals of the Economic Stabilization Program.

SUBPART K—RETAILERS AND WHOLESALERS

§ 150.301 *Purpose and scope.*

(a) Except as provided in § 150.302, this subpart prescribes mandatory controls applicable to firms which engage in retailers or wholesalers of crude petroleum or petroleum products to which Subpart L of this part applies.

(b) To the extent this subpart may be inconsistent with other provisions in this part, the provisions in this subpart govern.

§ 150.302 *Effective date of applicability to food retailers and wholesalers.*

Until September 12, 1973, this subpart does not apply to those retailers or wholesalers of meat or other food products who remain subject to Subpart M of Part 130 or Subpart I of Part 140 of this title until that time.

§ 150.303 *Definitions.*

As used in this subpart.

"Customer category" means a group of related customers distinguished from other customers because of customary price differentials between those customers and other customers, which is treated as a single pricing unit, irrespective of the products they purchase, for the purposes of this subpart.

"Gross margin" means the ratio that total revenues received less the cost of goods sold bears to total revenues received.

"Gross margin base period" means the last fiscal year ending prior to February 5, 1973.

"Merchandise category" means a group of related products which is treated as a single pricing unit for the purposes of this subpart.

"Pricing entity" means the lowest level of organization within a firm at which pricing decisions are made.

§ 150.304 *General pricing rules.*

(a) This section becomes effective with respect to a price category I firm or price category II firm to which this subpart applies when the firm submits the merchandise pricing plan required by § 150.306(a). It becomes effective with respect to a price category III firm to which this subpart applies when the firm completes the merchandise pricing plan required by § 150.309.

(b) A firm to which this section has become applicable may charge a price for an item in excess of the base price of that item only if—

(1) The gross margin for that item's merchandise category for any fiscal quarter in which the increased price is charged does not exceed the higher of—

(i) the gross margin realized for that category during the corresponding fiscal quarter of the gross margin base period; or

(ii) the gross margin realized for that category for the retailer's or wholesaler's gross margin base period;

(2) The gross margin for that item's merchandise category for any fiscal year in which the increased price is charged does not exceed the gross margin realized for that category for the retailer's or wholesaler's gross margin base period; and

(3) The firm's profit margin for any fiscal year in which the increased price is charged does not exceed its base period profit margin.

§ 150.305 Establishment of merchandise categories.

(a) Except as otherwise provided in this section a retailer or wholesaler shall use the merchandise categories set forth in Appendix A to this subpart.

(b) If a retailer or wholesaler sells items which do not fall within any of the categories listed in Appendix A, he may form additional merchandise categories, each of which must include all related items falling within the same general description. For each such category included in a plan required to be submitted to the Cost of Living Council pursuant to § 150.306, the retailer or wholesaler shall submit with the plan a statement demonstrating that the categories are consistent with the requirements of this subpart.

(c) If a retailer's or wholesaler's customary business relies on customer categories rather than merchandise categories, he may substitute customer categories in his merchandise pricing plan. When such a substitution is made in a plan required to be submitted to the Cost of Living Council pursuant to § 150.306, the retailer or wholesaler shall also submit a statement demonstrating that the categories are consistent with the requirements of this subpart.

(d) A firm which is primarily a retailer or wholesaler may include within its merchandise pricing plan related manufacturing and service activities which are integrated into its retail or wholesale activities and constitute not more than 10 percent of the firm's total retail and wholesale sales for the immediately preceding fiscal year.

§ 150.306 Merchandise pricing plans; retailers and wholesalers with annual revenues of \$50 million or more.

(a) Each price category I firm and each price category II firm to which this subpart applies, shall prepare and submit to the Cost of Living Council a merchandise pricing plan. The plan must include—

(1) A description of the retailer's or wholesaler's internal organization as it relates to pricing activities;

(2) A list of the retailer's or wholesaler's pricing entities;

(3) A completed Form CLC ----- on each pricing entity setting forth its merchandise categories, the base period gross margin for each category, and the gross margin realized for each category during each fiscal quarter of the gross margin base period;

(4) A list of products and product lines carried by the retailer or wholesaler; and

(5) A description of the manner in which the retailer or wholesaler makes its pricing decisions.

(b) Within 60 days after it receives a retailer's or wholesaler's merchandise pricing plan, the Council will review the plan and (1) approve it or (2) take the action provided for in § 150.307.

§ 150.307 Incomplete and nonconforming plans.

(a) If after reviewing a merchandise pricing plan submitted pursuant to § 150.306, the Cost of Living Council determines that the information submitted is incomplete or inaccurate or that the plan does not conform to the requirements of this subpart, it will notify the submitting retailer or wholesaler of its determination and the basis for that determination. The retailer or wholesaler shall, within the time prescribed by the Council, submit to the Council such additional data or information as the Council may require or such modifications to its plan as may be necessary to bring it into conformance with the requirements of this subpart. Effective upon receipt of the notice the retailer or wholesaler may not implement any further price increases until the Council approves the plan or otherwise advises the retailer or wholesaler.

(b) In addition, if the retailer or wholesaler fails to submit the required additional data, information, or modifications, within the time prescribed by the Council or, if after submission thereof, the Council determines that the merchandise pricing plan still does not conform to the requirements of this subpart,

it may order the retailer or wholesaler to reduce his prices to base prices or such other level above base prices as the Council may determine to be appropriate and to submit a new plan based on new categories or pricing entities, specified by the Council.

§ 150.308 Approved plans.

(a) After the Cost of Living Council approves a retailer's or wholesaler's merchandise pricing plan, the retailer or wholesaler shall use the categories and pricing entities specified in the approved plan in monitoring its prices and filing such reports as may be required by the Council.

(b) A retailer or wholesaler may modify its approved merchandise pricing plan only after the modification has been approved by the Council.

§ 150.309 Merchandise pricing plans; retailers and wholesalers with annual revenues of less than \$50 million.

Each price category III firm to which this subpart applies, shall prepare and maintain at its principal place of business, a merchandise pricing plan. The firm may group all of its retail or wholesale products into a single merchandise category, in which case its merchandise pricing plan need only consist of a completed Form CLC ----- setting forth the base period gross margin information for that single category. However, if the firm elects to use more than one category, its plan must include, to the extent applicable, each of the items specified in § 140.306(a) of this chapter for plans required to be submitted to the Cost of Living Council.

§ 150.310 Reporting.

(a) Each price category I firm and each price category II firm to which this subpart applies shall prepare and submit to the Cost of Living Council within 45 days after the end of each fiscal quarter a Form CLC in the manner prescribed by the Council.

(b) Each price category III firm to which this subpart applies shall prepare and submit to the Cost of Living Council within 45 days after the end of each fiscal year a Form CLC ---- in the manner prescribed by the Council.

§ 150.311 Repurification of a quarterly violation.

(a) If a firm's gross margin for a particular category for any fiscal quarter other than the fourth fiscal quarter, exceeds the limitations prescribed in § 150.304(b) (1), the Cost of Living Council will reduce any sanctions it may impose for the violation to the extent that the firm offset the overage in the succeeding fiscal quarter.

(b) If a firm's gross margin for a particular category has not exceeded the limitations prescribed in § 150.304(b) (1) during any of the first three fiscal quarters but exceeds those limits for the fourth fiscal quarter, the Cost of Living Council will not impose sanctions for the violation if the gross margin for that category for the fiscal year is within the limitation prescribed in § 150.304(b) (2).

(c) A firm is entitled to the quarterly gross margin overage relief provided by this section only once per category within any fiscal year.

APPENDIX A

MERCHANDISE CATEGORIES APPLICABLE TO RETAILERS AND WHOLESALERS

Department Stores

101	Bedroom furniture
102	Boys' clothing and accessories
103	Building supplies
104	Cafeteria
105	Children's shoes
106	China and crystal ware
107	Clocks and watches
108	Confections
109	Cosmetics and toilet articles
110	Dining furniture
111	Domestics—yard goods, linens, etc.
112	Eyeware
113	Giftware
114	Girls' clothing and accessories
115	Hand tools
116	Hardware
117	Hobbies, crafts and educational materials
118	Housewares—small appliances, kitchenware, etc.
119	Infants' ware
120	Jewelry
121	Lamps and other lighting fixtures

MERCHANDISE CATEGORIES APPLICABLE TO RETAILERS AND WHOLESALERS—Continued

Department Stores

- 122 Lawn and garden
- 123 Living room furniture
- 124 Luggage
- 125 Major appliances
- 126 Men's accessories
- 127 Men's clothing
- 128 Men's shoes
- 129 Notions
- 130 Office supplies and equipment
- 131 Outdoor furniture
- 132 Paint
- 133 Photo
- 134 Power tools
- 135 Rugs, carpets and other floor coverings
- 136 Silver pieces and silverware
- 137 Sporting goods
- 138 Tires, batteries and accessories
- 139 Wallpaper and other wall coverings
- 140 Women's accessories
- 141 Women's clothing
- 142 Women's shoes

Drugstores

- 201 Apparel
- 202 Books, magazines, newspapers
- 203 Cafeteria/restaurant
- 204 Cards and stationery
- 205 Confections
- 206 Cosmetics and toilet articles
- 207 Drugs—prescription
- 208 Drugs—non-prescription
- 209 Housewares
- 210 Medical and dental equipment and supplies
- 211 Notions
- 212 Photos
- 213 Seasonal—summer
- 214 Seasonal—winter
- 215 Tobacco products and related items
- 216 Toys and games

Variety Stores

- 301 Cafeteria
- 302 Children's and infants' apparel and accessories
- 303 Confections
- 304 Cosmetics and toilet articles
- 305 Domestics
- 306 Furniture and lamps
- 307 Hardware
- 308 Housewares
- 309 Jewelry, clocks, watches and giftware
- 310 Luggage
- 311 Men's apparel and accessories
- 312 Notions
- 313 Pets and pet supplies
- 314 Photo
- 315 Seasonal—summer
- 316 Seasonal—winter
- 317 Sporting goods
- 318 Stationery, office supplies and greeting cards
- 319 Toys, games and hobbies
- 320 Women's apparel and accessories

Food Operations

- 401 Alcoholic beverages
- 402 Baked goods
- 403 Canned food items
- 404 Dairy
- 405 Delicatessen
- 406 Fish, fresh
- 407 Frozen food
- 408 General merchandise, non-food
- 409 Grocery items other than canned
- 410 Health and beauty aids
- 411 Meat
- 412 Produce
- 413 Tobacco products and related items

Hardware Stores

- 501 Building materials—brick, sand, gravel, cement, concrete, etc.
- 502 Building supplies—windows, doors, screens, fences, hardware, etc.
- 503 Housewares
- 504 Lawn and garden supplies
- 505 Lumber
- 506 Paints, paint supplies
- 507 Tools, hand
- 508 Tools, power

MERCHANDISE CATEGORIES APPLICABLE TO RETAILERS AND WHOLESALERS—Continued

Furniture

701	Accessories, non-furniture
702	Bedding, spreads, pillows
703	Bedroom furniture
704	Carpets and floor covering
705	Diningroom furniture
706	Drapery and fabric
707	Lamps
708	Occasional furniture
709	Summer, patio, casual furniture
710	Upholstered furniture

SUBPART L—PETROLEUM AND PETROLEUM PRODUCTS

§ 150.351 *Purpose and scope.*

(a) This part prescribes mandatory controls applicable to the sale of crude petroleum and certain petroleum products and leases by gasoline manufacturers or resellers to gasoline retailers of real property to be used in the retailing of gasoline.

(b) To the extent this subpart may be inconsistent with other provisions in this part, the provisions in this subpart govern.

§ 150.352 *Definitions.*

For the purposes of this subpart

“Actual markup” means the difference between a seller’s January 10, 1973, selling price of a product (reflecting any applicable customary price differential) and the seller’s cost of that product which he sold on January 10, 1973. If the seller made no sale of that product on January 10, 1973, the selling price is the selling price of the product (reflecting any applicable customary price differential) in the most recent sale before January 10, 1973.

“Base price” means the base price determined pursuant to § 150.359, or in the case of a new product, § 150.360.

“Ceiling price” means the ceiling price determined pursuant to § 150.358.

“Customary price differential” includes a price distinction based on a discount, allowance, add-on, premium, and an extra based on a difference in volume, grade, quality, or location or type of purchaser, or term or condition of sale or delivery.

“Covered product” means a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321, or 2911.

“Domestic crude petroleum” means a crude petroleum produced in any of the several States, or the District of Columbia or from the “outer continental shelf” as defined in 43 USC 1331.

“Manufacturer” means a business entity which produces or refines crude petroleum, or refines liquid hydrocarbons from oil and gas field gases, or recovers liquefied petroleum gases incident to petroleum refining.

“Producer” means a business entity which produces crude petroleum.

“Reseller” means a person who carries on the trade or business of purchasing gasoline, heating oil, or diesel fuel, and without substantially changing its form, reselling it to other than ultimate consumers or purchasing any other covered product, and without substantially changing its form, reselling it to other resellers or to ultimate consumers.

“Retailer” means a person who carries on the trade or business of purchasing gasoline, heating oil, or diesel fuel and without substantially changing its form, selling it to ultimate consumers.

§ 150.353 *Ceiling price rule: Retail sales.*

(a) *Applicability.* This section applies to each retail sale of diesel fuel grade No. 2-D as defined in American Society for Testing and Materials (ASTM) D975-71, heating oil grade no. 2 as defined in American Society for Testing and Materials Designation (ASTM) D396-71, or any of the various grades of retail gasoline.

(b) *Rule.* No retailer of gasoline, diesel fuel or heating oil may charge a price for that product which exceeds the ceiling price of the product.

(c) *Posting.* Each retailer of gasoline shall post on each pump that he uses to dispense gasoline, the ceiling price and the minimum research octane rating (as described in the American Society for Testing Materials (ASTM) “Standard Specifications for Gasoline” (D439-70) of the gasoline sold from that pump.

§ 150.354 *Ceiling price rule: Crude petroleum.*

(a) *Applicability.* This section applies to (1), except as provided in paragraph (c) of this section, the first sale by a producer of domestic crude petroleum, and (2) the first sale by a royalty owner of domestic crude petroleum accepted as a royalty payment pursuant to the terms of a lease between the royalty owner and the producer of that domestic crude petroleum.

(b) *Rule.* (1) *General.* Except as provided in paragraph (b) (2) of this section, no producer of domestic crude petroleum and no royalty owner may charge a price higher than the ceiling price for that domestic crude petroleum.

(2) *Special release rule.* Notwithstanding paragraph (b) (1) of this section, a producer of new crude petroleum from a property which he leases or owns may in the month produced, or in any subsequent month, sell that new crude petroleum without respect to the ceiling price. However, if the amount of crude petroleum produced in any month is less than the base production control level for the property for that month, any new crude petroleum produced from that property during any subsequent month may not be sold pursuant to this subparagraph until an amount of the new crude petroleum equal to the difference between the amount of crude petroleum actually produced from that property during the earlier month and the base production control level for that property for the earlier month has been sold at or below its ceiling price.

(3) *Released crude.* If during a particular month, a producer produces from a property new crude petroleum which could be sold at other than the ceiling price pursuant to paragraph (b) (2) of this section, he may sell without regard to the ceiling price, an amount of the base production control level crude petroleum for that month equal to the new crude petroleum for that property for that month. The maximum price that he may charge for the crude petroleum (other than new crude) in this case shall be computed as follows:

$$P_{\max} = P_c + \left(\frac{C_{pr}}{C_{bpc}} - 1 \right) (P_m - P_c)$$

Where:

$P_{\max}$ = Maximum price that may be charged for the crude petroleum (other than new crude) purchased from the property (dollars per barrel);

P_c = Ceiling price of the crude petroleum (dollars per barrel);

C_{bpc} = Base production control level for the property (barrels);

C_{pr} = Total amount of crude petroleum produced from the property during the month (barrels); and

P_m = Current free market price of the particular quality and grade of crude petroleum (dollars per barrel).

Application of this formula may be illustrated by the following example:

Example: During September 1973, Firm X produces 8,170 barrels of a single grade of crude petroleum from a particular property. During September 1972, 6,420 barrels of crude petroleum were produced from the same property. The ceiling price for the September 1973 crude petroleum is \$4.10 per barrel, and its free market price (i.e. the price X can get on the market for the 1,750 barrels of new crude) is \$4.95 per barrel. The maximum price that X may charge for the 6,420 barrels of other than new crude petroleum (i.e. old plus release crude) produced in September 1973 is:

$$P_{\max} = \$4.10 + \left(\frac{8170}{6420} - 1 \right) (4.95 - \$4.10)$$

$$P_{\max} = \$4.10 + (.27)(\$.85)$$

$$P_{\max} = \$4.10 + \$.23$$

$$P_{\max} = \$4.33 \text{ per barrel}$$

(4) *Definitions.* For purposes of this subparagraph

“Base production control level” for a particular month means—

(i) For a particular property on which the producer has leased production rights, the total number of barrels of domestic crude petroleum produced in the same month of 1972 from that property.

(ii) For a particular property on which the producer owns production rights, the total number of barrels of domestic crude petroleum produced in the same month of 1972 from that property.

“New crude petroleum” means the total number of barrels of domestic crude petroleum produced from a leased or owned property in a specific month less the base production control level for that property.

(c) *Exchange for imported crude petroleum.* Notwithstanding paragraph (b) of this section, a producer of domestic crude petroleum who negotiates an exchange of domestic crude petroleum for an equal amount of imported crude petroleum to be refined by the producer may, subject to prior approval by the Cost of Living Council, price that domestic crude petroleum at a price not to exceed the price of the imported crude petroleum with which it is exchanged.

§ 150.355 *Price rule: Resellers.*

(a) *Applicability.* This section applies to each resale of a covered product, other than a retail sale of a product which is subject to § 150.353 and is purchased and resold without substantial change in form.

(b) *Rule.* No reseller of a product to which this section applies may charge a price in excess of the actual cost of the particular inventory of product being resold plus the actual markup the reseller applied to that product on January 10, 1973. If a covered product, imported from outside the several States and the District of Columbia is commingled with other imported product or with the same product produced in one of the several States or the District of Columbia, any increase in the cost of the imported product incurred after May 15, 1973, may be averaged into the cost of the product with which it is commingled. However, in no case may the reseller's profit margin exceed that which prevailed during its base period.

§ 150.356 *Price rule: Manufacturers.*

(a) *Applicability.* This section applies to each sale of a covered product by the manufacturer of that product other than—

- (1) a retail sale which is subject to § 150.353 ;
- (2) the first sale of domestic crude petroleum which is subject to § 150.354 ;
- (3) a resale which is subject to § 150.355 ; or
- (4) a sale of domestic crude petroleum in exchange for an equal dollar value of imported crude petroleum.

(b) *Rule.* Except as otherwise provided in this subparagraph, a manufacturer may not charge a price for a covered product in excess of the base price of that product until the proposed price increase has been prenotified to the Cost of Living Council using the prenotification procedure specified in Subpart H for price category I firms. A manufacturer may, without prenotifying the Council adjust its prices to the extent the adjustment reflects solely an increase in:

- (1) The price actually paid for domestic crude petroleum purchased and refined by the manufacturer over the ceiling price of that domestic crude determined in accordance with § 150.358(b) ; or
- (2) The price actually paid for imported crude petroleum (other than crude petroleum received through an equal exchange to which § 150.154(c) applies) refined by the manufacturer or for an imported covered product over the cost of that crude petroleum or product to that manufacturer on May 15, 1973.

However, in no case may the manufacturer's profit margin exceed that which prevailed during its base period.

§ 150.357 *Price rule: Leases.*

(a) *Applicability.* This section applies to each lease by a gasoline manufacturer or reseller of a retail gasoline station to a retailer of gasoline.

(b) *Rule.* A gasoline manufacturer who leases real property to a gasoline retailer for use in retailing gasoline may not—

- (1) increase, offer to increase, or give notice of intent to increase the rent for that real property to an amount in excess of the base rent established under § 150.359(b) ;
- (2) increase the retailer's obligation to sell covered products to a level above that which prevailed for that retailer during the month of May, 1973 ; or
- (3) impose any operating requirements on the retailer which would be inconsistent with the Economic Stabilization Program such as increasing the retailer's hours of operation or the volume of any covered product which he must sell.

§ 150.358 *Ceiling price determination.*

(a) *Retail diesel fuel, heating oil and gasoline.* The ceiling price of diesel fuel, heating oil, or gasoline for any particular location at which it is sold is the actual price paid by the seller for the product sold at that location on August 12, 1973.

plus the actual markup applied by the seller at that location on January 10, 1973 to the cost of the same product.

(b) *Domestic crude petroleum.* The ceiling price for a particular grade of domestic crude petroleum in a particular field is the highest posted price at 7:00 a.m., e.d.t., May 15, 1973 for that grade of crude petroleum at that field, or if there are no posted prices in that field, the related price for that grade of crude petroleum which is most similar in kind and quality.

§ 150.359 *Base price determination.*

(a) *Manufacturers.* The base price of a covered product being sold by the manufacturer of that product is the price the manufacturer charged for that product (reflecting any applicable customary price differential) on May 15, 1973. If the manufacturer made no sale of the product on May 15, 1973, the base price is the price he charged for that product in the most recent sale before that date.

(b) *Retail gasoline station rent.* The base rent with respect to a lease of real property by a gasoline manufacturer or reseller to a gasoline retailer for use in the retailing of gasoline is the rent charged for that station for the month of May, 1973.

§ 150.360 *Base price—new product.*

(a) The base price of a new product is :

(1) In the case of the first sale of domestic crude petroleum, the current free market price of that particular quality and grade of crude petroleum :

(2) In the case of a covered product (other than the first sale of domestic crude petroleum) being offered by the manufacturer of that product the median price charged for the same or most nearly comparable product (reflecting any applicable customary price differentials) on May 15, 1973, by other manufacturers selling the same or most nearly comparable product in the same marketing area ; and

(3) In all other cases, the median price currently being charged for the same or most nearly comparable product (reflecting any applicable customary price differentials) by other persons selling the same or most nearly comparable product in the same marketing area.

(b) *Definitions.* For purposes of this section

“Median price” means the highest price at which at least 50 percent of the product was sold.

“New product” means a product which the seller did not sell in the same or substantially similar form in the one year period immediately preceding the first date on which he offers it for sale or for lease and if it is substantially different in purpose, function and quality or technology or its use or service effects a substantially different result from any other property which the offering seller currently sells or sold at any time during the one year period immediately preceding the first date on which he offers it for sale.

§ 150.361 *Price information and certification.*

(a) *Price information.* Each seller of covered products shall maintain records of its base prices and ceiling prices and shall make available upon request by a customer, the base price or ceiling price of any item being offered for sale to that customer.

(b) *Certification.* Each seller of a covered product subject to this subpart shall upon request certify in the bill of sale that the sale was made at a price no higher than authorized by this subpart.

§ 150.362 *Reports and Recordkeeping.*

(a) *Reports.* (1) *Producers.* Each producer of domestic crude petroleum which derives \$50 million or more in annual sales or revenues from sales subject to § 150.354 shall prepare and file with the Cost of Living Council, quarterly reports on prices, cost, profits, and production levels on a form prescribed by the Council.

(2) *Manufacturers.* Each manufacturer of covered products and each retailer or reseller which derives \$50 million or more in annual sales or revenues from the retailing or reselling of covered products shall prepare and file with the Cost of Living Council, monthly and quarterly reports on price movements, costs and other related information on forms prescribed by the Council.

(b) *Recordkeeping.* Each retailer or reseller of covered products which derives less than \$50 million but more than \$1 million in annual sales or revenues from the retailing or reselling of those products shall prepare and maintain at its

principal place of business, monthly and quarterly reports on price movements, cost and other related information on forms prescribed by the Cost of Living Council.

SUBPART M—INSURANCE

§ 150.401 *Applicability.*

This subpart applies to each insurance rate increase to be placed into effect after August 12, 1973, which would increase the rate above the level in effect on that date, whether or not the increase is approved by a regulatory agency.

§ 150.402 *Definitions.*

As used in this subpart—

“Covered earned premium” means the total premium volume earned for all lines of insurance that are not exempt by § 150.43(b).

“Insurer” means a firm which by contract or for a stipulated consideration undertakes to compensate another for loss on a specified subject and is (1) subject to the regulatory jurisdiction of a State or the District of Columbia (including a person engaged in providing non-profit medical or hospital services under such a regulatory jurisdiction) or (2) undertaking to provide medical or hospital services for a capitation fee.

“Prenotifier” means a health insurer that had \$50 million or more of total covered earned premium or a property-liability insurer that had \$150 million or more of total covered earned premium during the year preceding the effective date of the rate increase it is proposing.

“Rate” means an amount to be charged, charged or paid for insurance, calculated in accordance with a rate making practice or formula, or developed under a classification system.

“Rate increase” includes a restriction in coverage, an increase in a deductible level, or any similar diminution of insurance coverage without a corresponding reduction in the rate.

“Rating bureau” means a person who makes, files, or submits insurance rates applicable to, on behalf of, or advisory for more than one insurer.

“State Regulatory Agency” means any commission, board or other legal body that has jurisdiction over rates or practices of insurers in a State or the District of Columbia.

§ 150.403 *Criteria.*

(a) Each insurance rate increase put into effect by any insurer or rating bureau (regardless of its total premium volume earned) after August 12, 1973, which would increase the rate above the level in effect on that date must be consistent with the following criteria:

(1) Factors that reflect experience incurred on all actual costs may be used in the customary manner in the rate-making process.

(2) Factors in the rate-making process or in the actual determination of the final premium that relate to or reflect changes in claim frequency, occurrence or utilization, changes in the classification of risks under class plans already in use or territory relativities, or similar changed conditions of risk may be used in accordance with customary practice provided such factors are supported statistically.

(3) Factors in the rate-making process reflecting or anticipating cost of price increases (i.e., trend factors to the extent they reflect or project inflation) may be used subject to the following restrictions:

(i) For any portion of the period of projection through August 14, 1971, the normal, full factors may be used, provided they are statistically supported by the latest available data in accordance with the insurer's customary practice.

(ii) For any portion of the period of projection after August 14, 1971, through November 13, 1971, a zero rate of inflation must be used.

(iii) For any portion of the period of projection after November 13, 1971, to January 11, 1973, the inflationary trend factor may not exceed five-eighths ($\frac{5}{8}$) of the factor otherwise justified at the time of determining the rate increase.

(iv) For any portion of the period of projection after January 11, 1973, to August 12, 1973, the inflationary trend factor may not exceed six-eighths ($\frac{6}{8}$) of the factor otherwise justified at the time of determining the rate increase.

(v) For any portion of the period of projection after August 12, 1973, to the end of the projection period, the inflationary trend factor may not exceed seven-eighths ($\frac{7}{8}$) of the factor otherwise justified at the time of determining the rate increase.

(vi) Notwithstanding subdivisions (iii), (iv), and (v) of this subparagraph, if the annualized inflationary trend based upon the latest available data is equal to or less than five-eighths ($\frac{5}{8}$) of the annualized inflationary trend based on experience and customary practices before August 15, 1971, that factor based upon the latest available data may be used for the period of projection from November 14, 1971, to the end of the projection period.

(4) Factors for claim settlement or loss adjustment expenses, contingencies which are separate, distinct and in addition to a profit factor, state taxes, licenses and fees, and commissions payable to licensed agents and brokers may be loaded on a percentage of premium or any other customary basis of actual incurred costs in accordance with customary practice. Any increases in the percentage loading for these expenses items must be justified.

(5) Factors for administrative expenses other than those specified in paragraph (a) (4) of this section when loaded as a percentage of premium must be limited to a maximum of a 5 percent increase in the dollar amount represented by the loading that was used in the prior rate. If administrative expenses are loaded on an actual cost basis, no increase will be permitted unless statistically supported.

(6) Any profit portion of premium, whether loaded as a percentage of premium of a dollar amount per contract, must be limited to a $2\frac{1}{2}$ percent increase in the dollar amount represented by the loading that was used in the prior rate. For purposes of this section, any portion of premium which is classified as a contribution to reserve, contingency reserve or similar element where a profit, as such, is not a part of the rate-making process, shall be treated as the profit provision.

(b) For the purpose of paragraph (a) (3) of this section, the period of projection covers the entire length of time from the underlying experience base to the future date to which loss or cost levels are being adjusted, regardless of how such period is customarily measured.

§ 150.404 Change in rate making formula.

No insurer or rating bureau may change a rule, rating formula, formula use or application, data base, rate making procedure or technique, or other element in the rate making process unless:

(a) the change will result in an overall premium level reduction;

(b) the change is necessitated by "no-fault" legislation enacted in a particular jurisdiction; or

(c) written approval has been granted by the Cost of Living Council.

§ 150.405 Prenotification.

(a) Each prenotifier, or rating bureau acting for a prenotifier, shall file a written notice with the Cost of Living Council and the appropriate State regulatory agency of each State to which the rate increase is applicable (or the State of domicile or delivery of the master policy for experience rated or group contracts applicable to a multi-State risk) of each proposed rate increase in excess of 5.0 percent which affects \$1 million or more of aggregate annualized premiums under the existing rate. Any subsequent proposed rate increase in the same calendar year for the same class of purchaser shall be prenotified regardless of the size of such rate increase. Each person submitting a notice under this section shall certify to the Cost of Living Council and the State regulatory authority that the proposed increase conforms to §§ 150.403 and 150.404. The certification must be signed by the chief executive officer of the prenotifier or by an individual to whom he has delegated that authority. A copy of the delegation must be filed with the Cost of Living Council.

(b) In any State in which rates are established by a State regulatory agency, that agency may submit a prenotification and certify to the Cost of Living Council that the rate increases are in compliance with §§ 150.403 and 150.404. An insurer using those State rates needs only to notify the Cost of Living Council and report quarterly that it is using those rates without submitting all of the supporting data.

(c) Any increase in excess of 5.0 percent which is to be effective in more than 25 jurisdictions may be prenotified directly to the Cost of Living Council in lieu of the procedure set forth in paragraph (a) of this section.

§ 150.406 Certification by State regulatory agency.

A State regulatory agency may agree, in writing, with the Cost of Living Council to certify that the rate increases of which it has received prenotification

under § 150.405 are or are not in compliance with §§ 150.403 and 150.404. Each agency entering into such agreement with the Cost of Living Council shall furnish its certification to the Council (with a copy to the insurer) within 20 days after it receives the prenotification. A certification by an agency under this paragraph is prima facie evidence that the proposed rate increase is or is not in compliance with §§ 150.403 and 150.404.

§ 150.407 Self-certification.

Whenever a prenotified, or a rating bureau acting for a prenotifier, cannot obtain a certification of a rate increase from a State regulatory agency in accordance with § 150.406 because:

(a) The State concerned has not agreed to furnish certifications under that paragraph; or

(b) The State regulatory agency did not act upon the filing within the period required under that paragraph;

The prenotifier or rating bureau shall immediately notify the Cost of Living Council that it cannot obtain the certification and may request the Council to act upon the certification filed with it under § 150.405.

§ 150.408 Cost of Living Council actions.

(a) With respect to any rate increase certified by a State regulatory agency under § 150.405 (b) or § 150.146, or self-certified by a prenotifier or a rating bureau acting for a prenotifier under § 150.407, the Cost of Living Council may, within 30 days after the State regulatory agency receives the prenotification take one or more of the following actions:

(1) Require the insurer to furnish additional information regarding the increase.

(2) Delay the effective date of the increase pending further Council action.

(3) Suspend all or part of the effect of the increase, pending further action by the Cost of Living Council or by the regulatory agency.

(4) Limit, refuse, rescind, reduce, or modify the increase.

(b) If the Cost of Living Council does not act upon a request under this paragraph before the end of the thirtieth day as described above, the increase may go into effect. However, in any case in which that period would otherwise end on a Saturday, Sunday, or Federal Holiday, it will end at the close of the next succeeding workday. A prenotification to a State regulatory agency which has been certified as being not in compliance with §§ 150.403 and 150.404 may not be placed into effect unless the written approval of the Cost of Living Council has been granted.

§ 150.409 Rates for replacement or revised insurance coverages.

The rate for a form of insurance coverage replacing or revising another form of insurance coverage previously written by the same insurer is subject to the same requirements as an increase in the rate for the previous insurance coverage would have been subject.

§ 150.410 Insurance rates subject to State laws.

Approval of an insurance rate increase under this section does not authorize the use of an insurance rate in contravention of any applicable State law that is not inconsistent with this section.

§ 150.411 Investigation and review of rates.

The Cost of Living Council acting with and through the appropriate State regulatory agency may require an insurer or rating bureau acting for an insurer to file with the appropriate State regulatory agency the latest available rate review for a particular class of business for which rates have not been revised in the last four quarters. The Head of the State regulatory agency shall determine whether the rate level filed is or is not consistent with the goals of the Economic Stabilization Program and shall so inform the Cost of Living Council.

§ 150.412 Reporting.

(a) Each health insurer that had \$25 million or more of total covered earned premium and each property-liability insurer that had \$50 million or more of total covered earned premium during the calendar year preceding any rate increase shall file a quarterly report with the Cost of Living Council with a copy to the appropriate State regulatory agency at the time it normally releases its quarterly reports, but in any event not later than 45 days after the end of the quarter, of each rate increase effected during the first quarter of the year end-

ing the preceding quarter that affected \$250,000 or more of aggregated annualized premiums under the pre-existing rate. However, with respect to a rate increase that has been prenotified the report need not include the supporting data required by § 150.414, but must list the rate increase, the name of the prenotifier or rating bureau, date of prenotification, line of insurance, State or States affected, and aggregate annualized premium affected. In addition, each report shall also include the latest available premium and claims or loss experience in the latest available rate level format for those lines of business or classes of coverage with an annualized premium volume of \$1 million or more for which rates were not revised during the last four quarters.

(b) Each health insurer which had \$25 million or more of total covered earned premium during the calendar year preceding any rate increase shall file with the Cost of Living Council a monthly notice not more than 30 days after the end of the month of all rate level increases and decreases effected during that month that affected \$250,000 or more of aggregate annualized premiums. This notice need not contain the data required under § 150.414, but should include a specification of the type of health insurance coverage, premium volume affected, average percentage change and dollar effect of that change. At the option of the health insurer such notice may also include information on those contracts with anniversary dates during that month for which no change in rate level was made.

§ 150.413 *Federal Employees Health Benefits Law.*

The Cost of Living Council designates the U.S. Civil Service Commission to act as certifying agent for contracts of insurers under the Federal Employees Health Benefits Law. Each prenotifier that proposes to increase a rate under such a contract shall file notice thereof with the Cost of Living Council and the Civil Service Commission. Each other insurer that proposes to increase a rate under such a contract shall file notice thereof with the Civil Service Commission. The Civil Service Commission shall, with respect to each proposed increase, certify to the Cost of Living Council that the increase is or is not in compliance with § 150.403 and that certification is prima facie evidence of compliance or noncompliance. A rate certified by the Civil Service Commission as being in compliance may go into effect on any date, specified by that Commission, that is at least 10 days after the date of the certification, and at least 30 days after the date of the prenotification.

§ 150.414 *Data requirements.*

Each prenotification filed under § 150.405 and each quarterly report made under § 150.112 shall include:

(a) The specifications of the coverages to which the rate increase is applicable and of the person or persons by which the rate is to be used;

(b) The average percentage increase by line of coverage and by State;

(c) The annualized inflationary trend factor or factors used with specification of the applicability of the factors if more than one are involved, including pre-Phase I, Phase I, Phase II, Phase III and Phase IV applicability separately; and

(d) Any other data specified by the Cost of Living Council on a form to be prescribed by the Council.

§ 150.415 *Monitoring by health insurers.*

Each health insurer is authorized and encouraged to monitor and report to health care providers (both institutional and noninstitutional) any price increases by those providers that involved significant deviation from the provisions of this part that apply to those providers and any increases in use of services or benefits that significantly exceeds its experience with that provider. Upon the receipt of such a report, the provider and the insurer shall make a good faith effort to determine whether any violation of this part has occurred and to take any steps to remedy such violation.

SUBPART P—MASS TRANSPORTATION SYSTEMS

§ 150.551 *Purpose and scope.*

This Subpart prescribes mandatory controls applicable to a firm which operates or controls a mass transportation system, the fares of which are not otherwise regulated.

§ 150.552 *Definition.*

As used in this Subpart—

“Mass transportation system” means a public benefit corporation, with annual sales or revenues in excess of \$10 million, which is charged by law or contract with the responsibility of operating a mass transportation facility or facilities which:

(a) Serves a Standard Metropolitan Statistical Area (SMSA); and

(b) Constitutes the sole or a principal means of public transportation for that area.

A facility or facilities includes a rapid rail transit, subway, elevated, bus system but does not include school buses or other conveyances used for sight-seeing or chartered for private use.

§ 150.553 *General rule.*

A public benefit corporation (within the meaning of Section 215 of the Economic Stabilization Act Amendments of 1971 (Public Law 92-210)), charged by law or contract with the responsibility to operate a mass transportation facility or facilities, the fares of which are not otherwise regulated, may not charge a price above the base price until the proposed price increase has been prenotified to the Cost of Living Council using the prenotification procedure specified in Subpart H for price category I firms.

2. Amend Part 130 in Subpart B by adding a new § 130.26 to read as follows:

§ 130.26 *Imposition of prenotification requirement.*

(a) *General.* Subject to the provisions of this section, the Council may require, with respect to a proposed or scheduled pay adjustment applicable to or affecting a specific firm or appropriate employee unit, that such pay adjustment shall not be put into effect until 30 days after prenotification of such pay adjustment has been received by the Council.

(b) *Applicability.* Prenotification pursuant to the provisions of paragraph (a) of this section may be required if the Council has reason to believe that—

(1) A proposed or scheduled pay adjustment, whether pursuant to a collective bargaining agreement or pay practice, may be in excess of the general wage and salary standard set forth in § 130.12;

(2) Such pay adjustment, if put into effect, may unduly influence the collective bargaining process in a destabilizing manner or may affect pay adjustments applicable to or affecting other firms or appropriate employee units; and

(3) Such pay adjustment appears to be unreasonably inconsistent with the standards and goals of the Economic Stabilization Program.

(c) *Control year.* A prenotification submitted pursuant to the provisions of paragraph (a) of this section shall include all pay adjustments put into effect, scheduled, or proposed to be put into effect with respect to the applicable control year, determined pursuant to § 201.52 of this title.

(d) *Service.* An employer submitting a prenotification under the provisions of paragraph (a) of this section shall at the same time serve a copy of each submission on the collective bargaining agent, if any, for the affected employee unit.

(e) *Receipt by Council.* A prenotification submitted pursuant to the provisions of paragraph (a) of this section shall be addressed to Office of Wage Stabilization, Cost of Living Council, Washington, D.C. 20508. Such prenotification shall not be considered submitted until actually received at such address.

(f) *Content of prenotification—*(1) *General.* A prenotification submitted pursuant to the provisions of this section shall be submitted by the employer on the Council's Form PB-3, pursuant to instructions issued by the Council. In addition, such prenotification shall include the supplemental information described in paragraph (f)(2) of this section. The Council may, under the circumstances of a specific case, waive one or more of the foregoing requirements in whole or in part, or may require the submission of additional information.

(2) *Supplemental information—*(i) *Narrative description of all changes with potential economic impact—*(a) *Wages, salaries and benefits.* Specify both the old and new wage and salary and benefit levels, as well as the extent of such changes within the following categories:

(1) *Straight-time hourly rates.* Straight-time hourly rates, including, but not limited to:

(i) Pattern of base pay increase, e.g., merit increases on a variable timing basis; across the board occupational differences, etc. Describe increases in terms of percent and cents per hour increases;

(ii) Basis of cost of living adjustments, limitations on adjustments, formula for adjustments, and total as well as time-weighted estimates of these adjustments;

(iii) Individual occupational rate changes resulting from consideration of factors such as rate inequities, job evaluation plan changes, skill or craft rate adjustments, etc.;

(iv) Changes affecting rates of pay or costs under production incentive programs;

(v) Progression program increase changes such as accelerated step changes or accelerated automatic changes between job levels, etc.; and

(vi) Reduction in scheduled hours worked which affects the base rate.

(2) *Included benefits.* Included benefits (with changes expressed in cents per hour), including, but not limited to:

(i) Premium pay for overtime, shift work, weekend and holiday work, special schedules, etc.;

(ii) Vacation and holiday provisions such as eligibility requirements, compensation provided, amounts of time off provided, etc.;

(iii) Pay for time off such as sick leave, bereavement, military, jury duty, etc.;

(iv) Severance pay, supplemental unemployment benefit plans, or other pay for terminated employees, etc.;

(v) Pay-as-you-go pension plans;

(vi) Paid rest, wash-up and meal time; and

(vii) Major subsidized training and educational programs.

(3) *Qualified benefits.* Qualified benefits, including, but not limited to:

(i) Pension plan eligibility requirements, benefit level, vesting provisions, survivor benefits, contributory rates, etc.;

(ii) Health insurance eligibility requirements, dependent coverage, type and level of benefits, contributory rates, etc.;

(iii) Life insurance eligibility requirements, type and levels of benefits, contributory rates, etc.;

(iv) Disability insurance eligibility requirements, type, level and duration of benefits, contributory rates, etc.;

(v) Sickness and accident benefits; and

(vi) Changes in other qualified benefit plans such as employees savings plans, etc.

(4) *Other changes.* Other changes with potential significant economic impact, including, but not limited to:

(i) Occupational lines of demarcation;

(ii) Crew size;

(iii) Apprentice-journeyman ratios;

(iv) Temporary assignment rules;

(v) Overtime scheduling requirements;

(vi) Other work rule or pay practice changes; and

(vii) Geographic adjustments or allowances.

(b) *Differential treatment.* Where specific employee groups within an appropriate employee unit are treated differentially, this should be noted and the reasons given. Provide both the old and new levels as well as the extent of all changes in straight-time hourly rates, included benefits, qualified benefits, and other changes with potential significant economic impact, for each employee group treated differently. An employee group is a sub-group of an appropriate employee unit and may be determined by skill, occupation, job grade or level, geographic location, or organizations, etc.

(ii) *Information on changes in pay rates—*

(a) For represented employees not covered by an established merit pay plan, submit a copy of the collective bargaining agreement covering the changes in pay rates, and a copy of the prior succeeded agreement, if any.

(b) For non-represented employees not covered by an established merit pay plan, submit appropriate documentation in lieu of a collective bargaining agreement.

(c) For employees covered by an established merit pay plan, submit a description of the plans, practices and controls used to govern wage and salary increases.

(d) For purposes of (a) and (b) of this subdivision, include sufficient information to describe any change in rates of pay except that where rate information is treated as confidential and regarded as proprietary, data which reflect the average changes in pay may be submitted.

(e) If pay adjustments are to be made differentially across groups, submit additional information indicating the amounts and reason for such expenditures and expressing amounts in both cents per hour and percentages.

3. Amend Part 130 in Subpart D by adding a new paragraph (d) to Section 130.34 to read as follows:

§ 130.34 *Certain pay adjustments.*

* * * * *

(d) *Pay adjustments in the lumber industry*—(1) *General.* Pay adjustments affecting employees engaged on a regular and continuing basis in the operation of an establishment in the lumber industry.

(2) *Definition.* For purposes of this paragraph, the term “establishment in the lumber industry” means an establishment classified in the Standard Industrial Classification Manual, 1972 edition, under Industrial Code 2411 (Logging Camps and Logging Contractors); 2421 (Sawmills and Planing Mills, General); 2426 (Hardwood Dimension and Flooring Mills); 2429 (Special Product Sawmills); 2435 (Hardwood Veneer and Plywood); 2436 (Softwood Veneer and Plywood); 2439 (Structural Wood Members, Not Elsewhere Classified); or 2492 (Particleboard).

[FR Doc. 73-15027 Filed 7-19-73; 4:30 pm]

[From the Federal Register, Aug. 24, 1973]

TITLE 6—ECONOMIC STABILIZATION

CHAPTER I—COST OF LIVING COUNCIL

PART 130—COST OF LIVING COUNCIL PHASE III REGULATIONS

PART 140—COST OF LIVING COUNCIL FREEZE REGULATIONS

Stage A Amendments

The purpose of these amendments is to make corrections and clarifications in the Phase IV Stage A food regulations.

Price adjustments for food items sold at a loss formerly were permitted only in situations where the freeze cost exceeded the freeze price and were restricted to increases only up to the freeze cost in the case of wholesalers and retailers purchasing directly from a producer of raw agricultural products sold for ultimate consumption in their original physical form and processors purchasing raw agricultural products. Section 140.93(d)(i) which governs these adjustments is amended by substituting the term “average cost” for “freeze cost”. Therefore, the price of these items may be increased to the average cost of the item if the average cost of the food item purchased during the freeze base period exceeded the freeze price. This amendment makes this treatment of this situation uniform for both adjustments for items sold at a loss and inventory price adjustments under § 140.93.

Section 140.14 governing imports is also amended to conform its provisions with the Stage A regulations. Sellers of imported food could previously pass on increases in the landed cost of a food item if the food item were not physically transformed or did not become a component of another item. Thus, sellers of any food item which did not go through further processing after its arrival in the U.S. could pass on dollar-for-dollar increases in the landed cost of the food in the same manner as resellers of other imports without any certification requirement. Persons importing semi-processed food for further processing however, could not take advantage of the dollar-for-dollar pass-through provisions of Subpart I because they could not obtain a certification of an increase in the raw agricultural costs of the food item as required in Subpart I nor did they meet the requirements of § 140.14. This amendment will now permit processors of semi-processed imported food to pass on increases in the cost of the imported food items in the same manner as processors using food of domestic origin, except that no certification will be required for these price increases.

The Stage A food regulations have previously been modified to eliminate the provision in 6 CFR 140.99 which limited the food recordkeeping requirements to

those food firms with annual sales or revenues in excess of \$50 million derived from sales of food. Section 130.129(c) of the meat ceiling regulation is now amended to conform the Stage A recordkeeping requirements for sellers of pork and lamb with the requirements which are now imposed on sellers of food under Subpart I of the freeze regulations.

Because the purpose of this amendment is to provide immediate guidance and information with respect to Cost of Living Council decisions, the Council finds that publication in accordance with normal rule making procedure is impracticable and that good cause exists for making this amendment effective in less than 30 days.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473, E.O. 11730, 38 FR 19345, Cost of Living Council Order No. 14, 36 FR 1489)

In consideration of the foregoing Chapter I of Title 6 of the Code of Federal Regulations is amended as follows, effective August 22, 1973.

Issued in Washington, D.C., on August 22, 1973.

JAMES W. McLANE,

Deputy Director, Cost of Living Council.

1. The first sentence of paragraph c of § 130.129 is amended to read as follows:
§ 130.129 *Requirements for sellers of swine and sheep.*

* * * * *

(c) *Recordkeeping requirements.* Each firm shall maintain comprehensive records of all price adjustments made pursuant to § 130.127 and § 130.128.

* * * * *

2. Section 140.14 is amended to read as follows:

§ 140.14 *Imported commodities and services.*

Notwithstanding the provisions of § 140.10, any person who imports and sells a commodity or service from outside the several States and the District of Columbia and each reseller of such a commodity or service may pass on increases in the landed cost for such imported commodity or service incurred after June 12, 1973, on a dollar-for-dollar basis so long as the commodity or service is neither physically transformed by the seller nor becomes a component of another product except that when the imported commodity is food, as defined in subpart I of this Part, increases in the landed cost of the commodity may be passed on without regard to the commodity's physical transformation or inclusion as a component of another product. However, this section shall not apply to commodities or services which were originally purchased in the United States but exported and subsequently imported in any form.

3. Section 140.93(d) (1) is amended to read as follows:

§ 140.93 *Special price rules.*

* * * * *

(d) *Adjustment for items sold at a loss* * * *

(1) In the case of wholesalers and retailers which purchase directly from a producer for resale raw agricultural products sold for ultimate consumption in their original physical form and manufacturers and processors which purchase raw agricultural products for processing, if the average cost of a food item purchased during the freeze base period exceeds the freeze price of a food item, the seller may charge a price in excess of the freeze price for that food item to reflect on a dollar-for-dollar basis increases in raw agricultural product costs incurred between January 10, 1973, and the freeze base period with respect to that food item which are not otherwise reflected in the freeze price. However, a price charged pursuant to this paragraph may not exceed the average cost of the food item during the freeze base period except to the extent that it reflects allowable cost increases.

[FR Doc. 73-18158 Filed 8-23-73; 10:27 am]

COST OF LIVING COUNCIL

[6 CFR Part 150]

STAGE B FOR FOOD

NOTICE OF PROPOSED RULEMAKING

INTRODUCTION

In Executive Order 11730, July 18, 1973, President Nixon directed that the freeze on food prices be removed in a two-stage process which would reestablish a flexible controls system. Stage A, which became effective on July 18, 1973, and which continues in effect until September 12, 1973, provides a means by which the food industry can charge prices above the general freeze or meat ceiling price levels in order to pass through on a dollar-for-dollar basis increases in costs of agricultural products. Stage B, which is to become effective on September 12, 1973, will complete the transition of the food industry from Phase III to Phase IV of the Economic Stabilization Program. The freeze on beef prices also ends on September 12, 1973.

The purpose of this notice of proposed rulemaking is to elicit public comment on the Cost of Living Council's proposed "Stage B" price rules for the food industry. These are set forth in a proposed Subpart Q to the Phase IV regulations. Interested persons are invited to participate by submitting written data, views, or comments with respect to the proposed regulations set forth in this notice to the Executive Secretariat, Cost of Living Council, 2000 M Street, NW., Washington, D.C. 20508. Submissions should be identified with the designation "Stage B Food Regulations" and comments should be organized either on a section-by-section or issue-by-issue basis, with only one section or issue discussed on a page. At least 10 copies should be submitted. All comments received by noon on September 4, 1973, will be considered by the Council before taking final action on the proposed regulations, and the proposed regulations may be changed in light of the comments received. All comments received in response to this notice will be available for examination and copying by interested persons during the hours 9:00 a.m. to 5:00 p.m., Monday through Friday, at the Council's Press Room at the above address.

In promulgating the "Stage A" food regulations, the Council stated that on September 12, 1973, the food industry will become subject to regulations similar to the Phase IV controls applied to the wholesale, retail, service and industrial sectors. The proposed "Stage B" food regulations as set forth herein are essentially the same as the Phase IV regulations now in effect, except that a gross margin rule is proposed for the food manufacturing sector. This rule and other significant differences are outlined below.

FOOD WHOLESALING AND RETAILING

With respect to food wholesaling and food retailing, the proposed regulations adopt the Phase IV, Subpart K regulations applicable to wholesaling and retailing. (Subpart K essentially permits a firm to apply the customary initial percentage markup (category basis) to cost of goods sold, or to realize a percentage gross margin (category basis) on cost of goods sold, which does not exceed the base period markup or margin. The profit margin rules apply if a price above the adjusted freeze price is charged.) However, firms engaged in food retailing are provided the option under the proposed regulations of choosing either one of the last two fiscal years which ended prior to February 5, 1973, for purposes of establishing a pricing base period. The Subpart K option with respect to the pricing base period is restricted to the last fiscal year ending prior to February 5, 1973, or the last four fiscal quarters ending prior to February 5, 1973. This modification is proposed in view of the exceptionally low level of profitability which prevailed in 1972 among food retailers.

In addition, the proposed regulations redefine "adjusted freeze price" for purposes of food wholesaling and food retailing to take into account prices charged in excess of the freeze price pursuant to the "Stage A" rules.

FOOD SERVICE ACTIVITIES

Food service activities are made subject to Subpart E of the Phase IV regulations ("Manufacturing and Service Activities"). This will permit dollar-for-dollar passthrough of all net allowable cost increases, including not only increases in cost of raw agricultural products but also increases in cost of labor and other costs.

Firms engaged in food service activities are permitted under the proposed regulations to compute an "adjusted freeze price" which takes into account prices charged in excess of the freeze price pursuant to the "Stage A" rules.

The proposed regulations waive the prenotification requirement with respect to good service activities. There are only a handful of price category I food service organizations, and the Phase IV rules (unlike those in Phase II) require all price category I firms to report their price increases on a quarterly basis. Moreover, the large restaurant and "fast food" chains, although classified as food service organizations, have some of the characteristics of a retail business, and retail activities have never been subject to prenotification requirements.

FOOD MANUFACTURING

Food manufacturing activities are subject under the proposed regulations to a gross margin rule with respect to food raw materials on a product line basis. This is similar to the gross margin rule to which firms engaged in the slaughtering and processing of livestock or the manufacturing of meat items were subject under § 130.57(d) of the Phase III rules prior to July 18, 1973. Cost increases with respect to costs other than food raw material costs are subject to prenotification and cost-justification.

Under the gross margin rule, increases and decreases in food raw material costs (costs which often fluctuate more than others) can be passed through on a dollar-for-dollar basis without the need for prenotification and "volatile" pricing authorization. Pricing is controlled not on the basis of the base price of a unit plus cost but on the basis of total revenues for the product line concerned in the current month. Total revenues may not exceed an amount derived under a formula which takes into account (1) the food raw material costs during the current month, (2) the base period gross margin rate (revenues less food raw material costs divided by volume) at the volume of food raw material units during the current month, and (3) the net allowable cost increases with respect to costs other than food raw material costs during the current month on a dollar-for-dollar basis.

The base period for gross margin purposes remains the same for meat manufacturers as in Phase III—any four consecutive fiscal quarters which began after May 25, 1970, and which ended prior to May 11, 1973. For other food manufacturers, the base period is any four consecutive fiscal quarters of the eight fiscal quarters which ended prior to September 12, 1973. However, for purposes of measuring net increases in allowable costs other than food raw material costs the base cost period is the quarter which next follows the four consecutive quarters selected by the firm concerned for gross margin purposes.

Increases in costs other than food raw materials costs are subject to prenotification (price category I firms only) and the rules contained in Subpart E of the Phase IV regulations. The profit margin rule applies when any price is charged which exceeds the adjusted freeze price, but the adjusted freeze price is computed in such a way as to take into account prices charged in excess of the freeze price pursuant to the "Stage A" rules.

Compliance with the gross margin rule is tested on a monthly basis after submission of an initial report which determines the base period gross margin for each product line involved, whether an input or output basis was used, which four consecutive fiscal quarters were selected for the base period and other information.

The maximum permissible sales revenues under the gross margin formula may be exceeded only if the firm concerned can demonstrate, to the satisfaction of the Council, that the excess is justified on the basis of seasonal patterns or is attributable to revenues derived from the sale of exempt items or from allowable prices under certain contracts as provided in § 150.76 of the Phase IV regulations. An exception may be requested if an excess results from unforeseen change in product mix.

A firm which derives both less than 20 percent of its annual sales or revenues from food manufacturing and less than \$50 million of annual sales or revenues

from food manufacturing may elect to price with respect to food manufacturing activities entirely in accordance with the Subpart E rules or under the proposed gross margin rule.

The proposed regulations also republish the Phase II rules respecting regulated milk and milk products. Those rules are modified, however, to apply the gross margin concept of control. Similarly, the rules for marketing cooperatives and market risk-sharing transactions are made subject to the gross margin control under the proposed regulations.

In consideration of the foregoing, it is proposed to amend Part 150 of Title 6, Code of Federal Regulations, as set forth below, effective 11:59 p.m., e.s.t., September 11, 1973.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 14; 38 FR 1489)

Issued in Washington, D.C., on August 22, 1973.

JOHN T. DUNLOP,
Director, Cost of Living Council.

1. The table of sections is amended by adding the following items regarding Subpart Q:

SUBPART Q—FOOD INDUSTRY

Sec.

- 150.601 Purpose and scope.
- 150.602 Applicability.
- 150.603 Definitions.
- 150.604 Food wholesaling and retailing.
- 150.605 Food service activities.
- 150.606 Food manufacturing: Gross margin for food raw materials.
- 150.607 Food manufacturing: Other pricing rules.
- 150.608 Regulated milk and milk products.
- 150.609 Marketing cooperatives and market risk-sharing transactions.

2. The part is amended by adding a new Subpart Q to read as follows:

SUBPART Q—FOOD INDUSTRY

§150.601 *Purpose and scope.*

This subpart provides the "Stage B" price rules whereby the food industry completes the transition from Phase III to Phase IV of the Economic Stabilization Program. This subpart supersedes Subparts F and M of Part 130 and Subpart I of Part 140 of this title effective 11:59 p.m., e.s.t., September 11, 1973. To the extent that this subpart may be inconsistent with any other provisions of this part, the provisions of this subpart govern.

§ 150.602 *Applicability.*

This subpart applies to all firms engaged in food manufacturing, food service activities, food wholesaling and food retailing.

§ 150.603 *Definitions.*

For purposes of this subpart—

"Adjusted freeze price" means:

(1) With respect to food subject to Subpart I of Part 140, the adjusted freeze price as defined in Subpart E of this part, except that in the case of an item priced in excess of the freeze price of that item pursuant to the Stage A rules for food provided in Part 140 of this chapter, the adjusted freeze price of that item is the last price lawfully charged for that item prior to the effective date of this subpart; or

(2) With respect to meat subject to Subpart M of Part 130:

(a) The ceiling price as defined in § 130.123 of this chapter;

(b) In the case of an imported meat item priced in accordance with § 130.121 of this chapter, the highest price lawfully charged for that item before September 12, 1973;

(c) In the case of a meat item priced in accordance with § 130.127 or § 130.128 of this chapter, the highest price lawfully charged for that item before September 12, 1973; and

(d) In the case of a meat item priced in accordance with an exception granted pursuant to the provisions of Part 130 of this chapter, the highest price lawfully charged for that item before September 12, 1973.

"Base period" means:

(1) With respect to the slaughtering and processing of livestock or the manufacturing of meat products, any four consecutive fiscal quarters, at the option of the firm concerned, which began after May 25, 1970, and which ended prior to May 11, 1973; and

(2) With respect to all other food manufacturing activities, any four consecutive fiscal quarters, at the option of the firm concerned, of the eight fiscal quarters which ended prior to September 12, 1973.

"Base period conversion cost rate" means the difference between (1) total sales revenues for a product line during the base period and (2) the total food raw material costs plus the operating profit for that product lined during the base period, divided by the volume of food raw material units for that product line during the base period. This computation is illustrated by the following equation:

$$\frac{B = R - (P + M)}{V}$$

Where

B=base period conversion cost rate.

R=total sales revenues during the base period.

M=food raw material costs during the base period.

P=operating profit during the base period.

V=volume of food raw material units during the base period.

"Base period gross margin rate" means the total operating profit for the product line concerned during the base period divided by the volume of food raw material units during the base period.

"Conversion costs" means total sales revenues less the sum of operating profit and food raw material costs.

"Conversion cost increase" means the difference between the conversion costs during the base cost period (as defined in § 150.607(b)(2)) and the conversion costs in the current cost period (as defined in Subpart G of this part), expressed as a percentage of the conversion costs in the base cost period.

"Food" means (1) items which are manufactured for human or animal ingestion except alcoholic beverages, tobacco products, or drugs, and

(2) Items which are not manufactured for human or animal ingestion but which as byproducts of food raw material are required by this section to be treated as food for purposes of this section.

"Food manufacturing" means the trade or business of preparing, processing, making, fabricating or assembling a food item by manual labor or machinery for sale and includes the slaughtering and processing of livestock.

"Food raw material" means, in the form in which they are received, raw, semi-processed or processed agricultural and marine products, including crops, livestock, poultry and catch from fresh water and the sea, and other edible products such as flavorings and preservatives, which are incorporated into the food item concerned.

"Food raw material costs" means the dollar amount, calculated in accordance with the customary accounting practice of the firm with respect to the product line concerned, derived from adding the total cost of inventory of food raw material on the first day of the period concerned and the total cost of food raw material purchased during that period, and subtracting from that sum the total cost of food raw material remaining in inventory of the first day after the period concerned.

"Food raw material units" means, at the option of the firm concerned and calculated in accordance with its customary accounting practice, either:

(1) The total units of food raw material in inventory on the first day of the period concerned, plus the total units of food raw material purchased during the period concerned, less the total units of food raw material remaining in inventory on the first day after the period concerned (input basis); or

(2) The total units of food sold during the period concerned (output basis).

"Meat" means food of the following description:

(1) Any "Meat", as defined in 9 CFR 301.2(tt); and

(2) Any "Meat byproduct", as defined in 9 CFR 301.2 (un); and

(3) Any "Meat food product", as defined in 9 CFR 301.2 (vv).

"Product line" means (1) with respect to the slaughtering and processing of livestock or the manufacturing of meat products, (i) a product or (ii) an aggregation of products categorized by a four-digit Standard Industrial Classification (SIC) code if that is the customary pricing unit (e.g., cost or profit center) with respect to that aggregation of products. An aggregation of products which in-

cludes more than one four-digit SIC code or an aggregation of products of less than one four-digit SIC code may be used provided the level of aggregation reflects the entity's customary pricing unit (e.g., cost or profit center) with respect to that level of aggregation chosen.

(2) With respect to all other food manufacturing activities (i) a product or (ii) an aggregation of products categorized by a four-digit Standard Industrial Classification (SIC) code if that is the customary pricing unit (e.g., cost or profit center) with respect to that aggregation of products. An aggregation of products of less than one four-digit SIC code (but not more than one four-digit SIC code) may be used provided the level of aggregation reflects the customary pricing unit (e.g., cost or profit center) with respect to that level of aggregation chosen.

"Total sales revenues" means the aggregate revenue from the sale of food.

§ 150.604 *Food wholesaling and retailing.*

(a) *General Rule.*—Except as provided in paragraph (b) of this section, Subpart K of this part applies to the wholesaling and retailing activities of firms subject to this subpart.

(b) *Subpart K modifications.*—(1) A firm engaged in food retailing and which derives 75 percent or more of its annual sales or revenues from retail food sales may, at its option, use as a pricing base period either one of the last two fiscal years which ended prior to February 5, 1973, and may apply the pricing base period chosen to both its food and nonfood retail activities.

(2) "Adjusted freeze price" means adjusted freeze price as defined in § 150.603.

§ 150.605 *Food service activities.*

(a) *General rule.*—Except as provided in paragraph (b) of this section, Subpart E of this part applies to the food service activities of firms subject to this subpart.

(b) *Subpart E modifications.*—"Adjusted freeze price" means adjusted freeze price as defined in § 150.603 of this subpart.

(c) *Prenotification.*—Section 150.151 does not apply with respect to the food service activities of firms subject to this subpart.

§ 150.606 *Food manufacturing: Gross margin for food raw materials.*

(a) *Purpose and scope.*—The purpose of this section is to apply to food manufacturing activities, on a product line basis, a gross margin rule of the type previously applicable only to firms engaged in the slaughtering and processing of livestock or the manufacturing of meat items. Except as provided in paragraph (b) of this section, the gross margin rule is applicable with respect to all food manufacturing activities. Under the gross margin rule, increases and decreases in food raw material costs (costs which generally fluctuate significantly) can be passed through on a dollar-for-dollar basis without prenotification and without "volatile" pricing authorization. Price increases to recover net allowable increases in costs other than food raw material costs are subject to Subpart E of this part as modified by § 150.607.

(b) *Applicability.*—This section applies to the food manufacturing activities of all firms, except that a firm which both derives less than 20 percent of its annual sales or revenues from food manufacturing and less than \$50 million of annual sales or revenue from food manufacturing may elect to price with respect to its food manufacturing activities in accordance with this section or in accordance with Subpart E of this part. A firm engaged in food manufacturing which also produces non-food by-products of food raw materials, such as leather, tallow, and industrial oils, shall treat those by-products as food items for purposes of this section.

(c) *Gross margin rules.*—(1) Except as provided in paragraph (c) (2) of this section, any price may be charged with respect to any item as long as total sales revenues for a product line for any accounting month ending after September 11, 1973, do not exceed the amount derived by (i) multiplying the base period conversion cost rate for that product line by the volume of food raw material units for that product line in the accounting month concerned, (ii) multiplying the product in (i) by the conversion cost increase for that product line plus 100 percent and (iii) adding to the product in (ii) the food raw material costs for that product line in the accounting month concerned plus the base period gross margin rate for that product line times the volume of food raw material units for that product line in the accounting month concerned. This computation is illustrated by the following equation:

$$R = (B \times V) (C + 100\%) + M + (P \times V)$$

Where

R=total sales revenues for the accounting month concerned

B=base period conversion cost rate

V=volume of food raw material units during the accounting month concerned

C=conversion cost increase

M=food raw material costs during the accounting month concerned

P=base period gross margin rate

(2) (i) Sales revenues for any accounting month may exceed the total sales revenues calculated in accordance with paragraph (c) (1) of this section only if the firm concerned demonstrates, to the satisfaction of the Council, that the excess is justified on the basis of seasonal patterns or is attributable to revenues derived from the sale of exempt items or from allowable prices pursuant to § 150.76.

(ii) Total sales revenues in any product line in the accounting month which includes September 11, 1973, may exceed the amount specified in paragraph (c) (1) of this section. However, total sales revenues in any product line in the next succeeding accounting month may not exceed the amount specified in paragraph (c) (1) of this section less the amount of revenue excess experienced in the accounting month which includes September 11, 1973, which is not justifiable on the basis of seasonal patterns or attributable to revenues derived from the sale of exempt items or from allowable prices pursuant to § 150.76.

(3) (i) Notwithstanding paragraph (c) (1) and (2) of this section, a firm subject to this section which charges a price for any item in excess of the adjusted freeze price for that item may not, for the fiscal year in which that price in excess of the adjusted freeze price is charged, exceed its base period profit margin as defined in § 150.31.

(ii) The Council shall excuse a profit margin excess for any fiscal year to the extent that the firm concerned demonstrates, to the satisfaction of the Council, that the excess is attributable to the sale of exempt items or to the charging of allowable prices pursuant to § 150.76.

(4) (i) Food raw material purchased and resold without change in form may be excluded in computing the base period conversion cost rate. Food raw material purchased and resold without change in form shall be excluded in computing food raw material units and food raw material costs for any accounting month ending after September 11, 1973.

(ii) The cost of freight and insurance in connection with the purchase of food raw material ("freight-in") may either be included in or excluded from food raw material costs during the base period but the treatment of "freight-in" shall be consistent as between the base period and each accounting month ending after September 11, 1973. The cost of freight and insurance in connection with food sales ("freight-out") may either be included in or excluded from food sales revenues during the base period but the treatment of "freight-out" shall be consistent as between the base period and each accounting month ending after September 11, 1973.

(iii) A firm which uses the futures markets in a non-speculative manner to hedge against price risks may include as a food raw material cost during the base period any net loss as a result of non-speculative hedging activities with respect to the food raw material concerned during the base period, and may include as an offset to food raw material costs any net gain as a result of non-speculative hedging activities with respect to the food raw material concerned during the base period. Similarly, any net hedging losses by that firm with respect to food markets during the base period may be included as an offset to total sales revenues during the base period and any net hedging gains by that firm with respect to food markets during the base period may be included in total sales revenues during the base period. However, a firm which includes any net loss pursuant to the preceding two sentences shall include as an offset any net gain as a result of non-speculative hedging activities in accordance with the preceding two sentences. Any net hedging losses with respect to the food raw material concerned during the accounting month concerned may be included as a food raw material cost for the fiscal quarter concerned and any net hedging gains with respect to the food raw material concerned during the accounting month concerned shall be included as an offset to food raw material costs for the fiscal quarter concerned. Any net hedging losses with respect to the food market concerned during the accounting month concerned may be included as a food raw material cost for the accounting month concerned and any net hedging gains with respect to the food market concerned during the accounting month concerned

shall be included as a offset to food raw material costs for the accounting month concerned.

(5) For purposes of the gross margin rule, the base period with respect to a new product line shall be the accounting month following the month in which the first sale occurs. The gross margin rules of this section apply with respect to that new product line beginning with the first day after the base period. However, if a firm acquires another firm, the base period conversion cost rate established by the acquired firm with respect to each of its product lines shall remain the base period conversion cost rate of each of these product lines and the gross margin rules of paragraph (c) of this section apply with respect to each of those product lines immediately upon acquisition.

(d) *Options and business practices.*—(1) The exercise of the options with regard to the use of the gross margin rule, the determination of the base period, the exclusion of certain food raw materials in the computation of the base period conversion cost rate, and the method of calculating food raw material units shall be made as follows:

(i) In the case of a price category I or II firm, the option selected in each case shall be set forth in the initial report submitted to the Council pursuant to paragraph (c) of this section; and

(ii) In the case of a price category III firm, the option selected in each case shall be recorded in a document placed among the firm's records.

No change in the exercise of any of these options may be made without the prior written approval of the Council or the Internal Revenue Service.

(2) Any calculations made pursuant to this section must be reconciled with any change in customary business practices adopted and implemented by the firm.

(e) *Reporting and recordkeeping.* (1) *Initial report.*—Each price category I and II firm to which this section applies shall submit to the Cost of Living Council within 15 days of the effective date of this section an initial report which provides the following information:

(i) A description of the product lines of the firm and related four-digit SIC codes;

(ii) Information which demonstrates how the gross margin was calculated for each product line;

(iii) A statement as to whether an input or output basis was used in calculating food raw material costs;

(iv) The nature of the food raw materials included in the computation of each base period conversion cost rate;

(v) The four consecutive fiscal quarters selected for the base period;

(vi) A statement as to whether certain food raw materials were excluded from the computation of each base period conversion cost rate pursuant to paragraph (c) (4) (i) of this section.

(2) *Monthly report.*—Each price category I and II firm to which this section applies shall submit monthly reports with information on costs, sales and profits in accordance with forms and instructions issued by the Council. A monthly report shall be submitted within 30 days after the close of each accounting month.

(3) *Recordkeeping.*—Each price category III firm to which this section applies shall prepare and maintain at its principal place of business sufficient records to determine compliance with this section.

§ 150.607 *Food manufacturing: Other pricing rules.*

(a) *General rule.*—Except as provided in paragraphs (b) and (c) of this section and in § 150.606, Subpart E of this part applies to the manufacturing activities of firms subject to this section.

(b) *Subpart E modifications for firms using gross margin rules.*—(1) Food raw materials may not be used as allowable costs for purposes of price adjustments pursuant to Subpart E of this part.

(2) The base cost period is the next succeeding fiscal quarter following the base period as defined in § 150.603 in which costs other than food raw materials costs were incurred with respect to the product line concerned. The base cost period with respect to a new product is the fiscal quarter for which the new product concerned with first sold in arms-length trading between unrelated persons.

(3) Calculation of costs other than food raw material costs shall be made on the same basis (input or output used in calculating food raw material units pursuant to § 150.603.

(4) "Product" is a product line as defined in § 150.603.

(5) The price of an item which qualifies as a "new product" pursuant to § 150.103, or as "custom product" pursuant to § 150.104, shall be determined in accordance with the rules for determining base price provided in those sections,

subject to the limitation that the total sales revenues for the product line within which the new product or custom product falls may not, for any accounting month, exceed the amount prescribed under the gross margin rules in § 150.606(c).

(6) "Adjusted freeze price" means adjusted freeze price as defined in § 150.603.

(c) *Subpart E modifications for other firms.*—Subpart E of this title applies with respect to the food manufacturing activities of firms which elect pursuant to § 150.606(b) to price in accordance with that subpart, except that "adjusted freeze price" means adjusted freeze price as defined in § 150.603.

§ 150.608 *Regulated milk and milk products.*

(a) *Definitions.*—For purposes of this section:

"Regulated milk and milk products" means milk and milk products with respect to which the minimum price is established or the minimum and maximum prices are established by a regulatory agency.

"Regulatory agency" means any commission, board, or other legal body established in any State or the District of Columbia, which has jurisdiction to order increases, or reductions, or both, in the prices charged for fluid milk and milk products.

"Milk and milk products" includes fluid milk (other than raw milk), low-fat milk, nonfat (skim) milk, buttermilk, cream, half-and-half, chocolate milk, and cottage cheese.

"Regulated seller of milk and milk products" means any seller of milk and milk products whose minimum selling prices are fixed by a regulatory agency and includes a firm engaged in processing, distributing, wholesaling, or retailing.

(b) *General rule.*—Notwithstanding any other provision of this part, but subject to paragraph (c) of this section, a regulated seller of milk and milk products may charge any price with respect to any item if that price has been approved as a minimum price by a regulatory agency. A regulated seller of fluid milk and milk products which is a prenotification firm, whose minimum prices for such products to its customers are established by that regulatory agency, may sell milk and milk products at the minimums so established without prenotifying.

(c) *Report by regulatory agency.*—A regulatory agency which establishes minimum prices for sellers of milk and milk products must furnish to the Council at least 15 days before the proposed increases are to be effective—

(1) A statement of the types of price increases subject to its jurisdiction and generally describing the method used for establishing prices;

(2) A certification as to each price increase it approves (in the order granting the increase or in a separate document) of the following:

(i) The former price, the date it was estimated, the new price, the percentage increase, and the proposed effective date of the new price;

(ii) That the increase is the minimum required to assure a continued, adequate supply of pure and wholesome milk and milk products; and

(iii) That, excluding price increases paid for raw milk (which is exempt from this title) and partially processed products made therefrom, the increases established by the regulatory agency will not result in total sales revenues which exceed the amount permitted under § 150.606(c).

(d) *Industry averages.*—If a price increase by the regulatory agency is premised on cost or other data compiled on the basis of industry averages or samples of the industry which it regulates, compliance with § 150.606(c) may be based on that industry data. However, the Council reserves the right to require the regulatory agency to submit, or to require any regulated seller of milk and milk products to provide, any additional information that the Council considers relevant, including requesting the regulatory agency to obtain from the industry or the same sample on which its increases were predicated, the following information:

(1) For processors—the base period profit margin and the profit margin in a period reflecting the new prices; or

(2) For wholesalers or retailers—the customary initial percentage markup applied during the pricing base period; the percentage markup reflected by the allowed price increases; the gross margin realized during the pricing base period; the gross margin realized by the allowed price increases; the profit margin in the base period, and the profit margin in the period reflecting the new prices.

(e) *Effective date of price increases.*—At any time within 10 days after receiving a report under paragraph (c) of this section the Council may take any action provided in paragraph (f) of this section, or it may take no action in which case the price increases permitted by this section may become effective on the date specified in the regulatory agency order.

(f) *Council actions.*—With respect to any price increase permitted by this section, the Council may—

(1) Require the regulatory agency to furnish additional information concerning the increase ;

(2) Delay the effective date of the increase pending further Council action, but not for longer than 15 days after receiving the additional information requested under paragraph (f) (1) of this section ;

(3) Suspend all or part of the increase pending further action by the Council or the regulatory agency ; or

(4) Approve, reject, limit, rescind, reduce, or modify the increase.

§ 150.609 *Marketing cooperatives and market risk-sharing transactions.*

(a) A marketing cooperative as defined in § 150.204(b) is subject to the operations of the gross margin rule in § 150.605 with respect to its food manufacturing activities. For purposes of computing food raw material costs, marketing cooperatives shall use the imputed allowable costs determined in accordance with § 150.204(d).

(b) Firms which are engaged in market risk-sharing transactions as defined in § 150.204(b), and which are not otherwise marketing cooperatives as defined in § 150.204(b) shall treat such transactions as a separate product line. For purposes of computing raw material costs, such firms shall use the imputed allowable costs determined in accordance with § 150.204(d).

[FR Doc. 73-18045 Filed 8-22-73 ; 11 :45 am]

COST OF LIVING COUNCIL

FOOD INDUSTRY WAGE AND SALARY COMMITTEE

NOTICE OF CLOSED MEETING

Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770) notice is hereby given that the Food Industry Wage and Salary Committee, established under the authority of section 212(f) of the Economic Stabilization Act, as amended, section 4(a)(iv) of Executive Order 11695, and Cost of Living Council Order No. 14, will meet at 10:00 a.m., Wednesday, August 29, 1973, at 2025 M Street NW., Washington, D.C.

The agenda will consist of discussions leading to recommendations on specific Phase II and Phase III wage cases in the food area, and future wage policy.

Since the above stated meeting will consist of discussions of future food wage policy and Phase II and III cases for decision, pursuant to authority granted me by Cost of Living Council Order 25, I have determined that the meeting would fall within exemption (5) of 5 U.S.C. 552(b) and that it is essential to close the meeting to protect the free exchange of internal views and to avoid interference with the operation of the Committee.

Issued in Washington, D.C. on August 22, 1973.

HENRY H. PERRITT, Jr.,
Executive Secretary.

[FR Doc. 73-18121 Filed 8-22-73 ; 4 :46 pm]

[From the Federal Register, Aug. 31, 1973]

COST OF LIVING COUNCIL

[6 CFR Part 152]

EXECUTIVE AND VARIABLE COMPENSATION

NOTICE OF PROPOSED RULEMAKING

Notice is hereby given that the regulations set forth in tentative form below are proposed to be prescribed by the Cost of Living Council. Since the rules set forth in Part 152 are essential to the expeditious implementation of the Economic Stabilization Act of 1970, as amended, the Council finds that the time for submission of comments or suggestions by interested persons in accordance with usual rulemaking procedures is impracticable and that good cause exists for making these regulations effective in less than 30 days. Prior to final adoption of the

regulations, consideration will be given to any comments or suggestions pertaining thereto which are submitted in writing and received by the Council on or before September 17, 1973. Communications should be addressed to the Office of General Counsel, Cost of Living Council, Washington, D.C. 20508, and should be designated in bold type EXECUTIVE AND VARIABLE COMPENSATION COMMENTS. Any written comments or suggestions not specifically designated as confidential may be inspected by any person upon written request.

The public is cautioned to note that these proposed regulations, when adopted in final form, *will be effective retroactively to August 29, 1973*, the date of issuance of the proposed rules.

The proposed rules are to be issued pursuant to authority vested in the Council under the Economic Stabilization Act of 1970, as amended, Public Law 92-210, 85 Stat. 743; Public Law 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473, E.O. 11730, 38 FR 19345; and Cost of Living Council Order No. 14, 38 FR 1489.

Subpart K of Part 152 proposes to establish rules and standards to be utilized in the control of executive and variable compensation in Phase IV of the Economic Stabilization Program. The basic rules previously applied to executive and variable compensation by the Pay Board during Phase II (previously contained in Subpart F of Part 201) and additional rules governing self-administration under the Phase III program (originally contained in Part 130) are now combined in one subpart. In addition, Subpart K contains new rules and standards which the Council proposes to adopt as a result of an intensive review of the operation of executive and variable compensation plans, practices, and programs thus far in the Economic Stabilization Program.

In general, the new rules (primarily set forth in the new §152.130) will require every firm subject to the Economic Stabilization Program, regardless of industry, to designate an executive control group which shall consist of the firm's employee directors and officers whose aggregate direct remuneration is required to be reported on proxy statements under the Rules and Regulations of the United States Securities and Exchange Commission or would be required to be reported if the firm were subject to such Rules and Regulations. Special mandatory rules are proposed to be applied to compensation paid to members of an executive control group, limiting aggregate increases in base salaries and establishing proportional limitations on bonus payments. These rules applicable to executive control groups will be in addition to the prior rules applicable to wage and salary increases for members of appropriate employee units and to bonus payments to members of plan or practice units. A procedure is proposed to be established whereby an exception to these limitations may be requested, in cases of hardship or inequity. Further, the new rules will require certain reports to be filed with the Council and records to be maintained with respect to compensation paid to members of executive control groups. Prior approval will be required for new, revised, or replacement incentive plans or practices covering members of an executive control group.

A number of other changes are proposed to be made in the rules governing executive and variable compensation, affecting not only the members of executive control groups but also other employees in industries subject to mandatory controls or self-administration under the Economic Stabilization Program. For example, the prior rules permitting "excess bonus payments to be charged against the general wage and salary standard for appropriate employee units will be eliminated, except in situations in which the membership of the plan or practice unit and the membership of one appropriate employee unit are co-extensive. Also, certain stock options that were formerly valued and charged as a wage and salary increase for members of an appropriate employee unit will be subject to the rules governing incentive compensation plans and practices. Other changes and additions, which are described below in greater detail, are for the most part technical revisions proposed to clarify provisions of the prior regulations. In addition, conforming and technical changes have been made to reflect the placement of the regulations in the new Part 152.

These amendments to the Economic Stabilization Program are proposed to be adopted for a number of reasons. Soon after the commencement of Phase III in January 1973, the Council directed an audit of the executive and variable compensation plans and practices of many firms in various industries. The Council subsequently determined that although wage and salary increases for appropriate employee units which included top executives were generally within the general wage and salary standard, such units often included numerous other management and salaried personnel in addition to the top executives. Later in 1973, various business periodicals published survey data (many of

which contained inaccuracies), based on reports of aggregate remuneration reported to the U.S. Securities and Exchange Commission. The survey data appeared to indicate that in 1972 the highest paid executives received salary increases in excess of the general wage and salary standard, as well as substantial increases in bonus awards.

The Council undertook a comprehensive review of the Phase III regulations then applicable to executive and variable compensation, in order to determine whether changes were required for more effective control of such compensation. The Council recognized that it was also important that such control not impair unnecessarily the operation of incentive compensation plans and practices, which are an integral part of the compensation of executives through private industry. In conducting its review, the Council's staff secured comments and suggestions for changes in the regulations from businessmen, attorneys, and other experts in the field of executive and variable compensation.

On the basis of its review, the Council determined that special rules applicable to top management employees of firms were essential to insure the continued integrity of the Economic Stabilization Program. The following considerations were particularly significant:

1. During any period of wage and salary stabilization, it is appropriate to adopt a program which treats equitably all levels of wage earners, which requires all segments of the economy to make generally comparable sacrifices, and which inspires public confidence in the stabilization goals to be achieved. It is difficult to evaluate the impact on public confidence that resulted from the assertions made by the often erroneous public surveys of executive compensation. However, the Council believes that such surveys often did lead many persons to conclude that the Phase III rules on executive and variable compensation did not achieve the desired balance of generally comparable sacrifices by all segments of the economy.

2. Top executives of a firm generally participate in or at the very least strongly influence the decisions relating to aggregate increases in compensation for all employee groups and the internal allocation of those increases among employee groups in a firm. Permitting the top executives to be included in an appropriate employee unit with other employees, without any constraints on the manner in which compensation increases are allocated within the unit, can lead to a lack of confidence that the Economic Stabilization Program requires the same degree of wage restraint for all employees within a firm.

3. The published reports of executive compensation trends are inadequate for stabilization purposes since these reports do not adequately differentiate between salary increases and changes in incentive compensation payments. Since the Council must be able to provide accurate reports as to trends in compensation for all groups of employees subject to the Economic Stabilization Program, and must of course possess such information in order to administer the program effectively, identification and reporting of executive compensation trends covering only the clearly-recognized top management personnel are essential. Under former regulations, salary increases and bonus payments made by firms subject to voluntary compliance were generally not required to be reported to the Council. The imposition of mandatory rules relating to reporting and recordkeeping with respect to such increases and payments to top management personnel will assist in keeping the compensation of such personnel under reasonable restraint.

Additional details with respect to provisions of Subpart K, compared to the prior regulations are provided below under each section heading:

Section 152.121 Scope.—This section is an expansion of the former § 201.71. Paragraph (d) is a clarifying rule which provides that the exclusions from adjustment computations, set forth in § 201.60 (relating to promotions, orevity plans, etc.) are not applicable to payments, awards, or grants under incentive compensation plans or practices, sales or commission plans or practices, or production incentive programs.

Section 152.122 Definitions.—This section is the former § 201.72 with the definitions placed in alphabetical order. In addition, a definition of "performance share plan" has been added. Only plans which meet the requirements of this definition are subject to the valuation approach set forth in § 152.124(d) (3) (ii).

Section 152.123 Executive salaries and job perquisites.—This section is essentially the same as the former § 201.73.

Section 152.124 Incentive compensation plans.—This section contains portions of the former § 201.74, with new material. Paragraph (a) defines the applicability of the regulation: it provides guidance to be used by firms subject to self-

administration under the Phase IV rules; mandatory rules to be observed by firms in the food, health, and construction industries; and mandatory rules which are to be applied by all firms in determining the amounts pursuant to incentive compensation plans which may be paid to members of executive control groups.

Paragraph (c)(3)(i) makes clear that the allowable amount may be increased by 5.5 percent (compounded) for each year subsequent to the first plan year for which payment is made on or after November 14, 1971, or for each year subsequent to the last year during which the plan operated under § 201.35. This computation is illustrated by an example in paragraph (g).

Paragraph (d)(2)(i) provides that an amount in excess of the allowable amount may not be paid. This is a mandatory rule with respect to industries subject to mandatory controls and with respect to members of executive control groups; the rule shall serve as guidance for members of plan units subject to self-administration who are not members of an executive control group. Formerly the rules permitted such excess payment to be charged as a wage and salary increase to the members of the appropriate employee unit or units which included plan participants. An exclusion from application of the new rule is provided only for a case in which the employee membership of one plan unit is coextensive with the employee membership of one appropriate employee unit. Since an excess may be paid only in this situation, the former rules with respect to the treatment of an excess have been simplified by deletion of the provisions respecting apportionment to appropriate employee units. A new rule provides that an excess shall be considered to be a wage and salary increase not later than the last day of the sixth month after the end of the plan year.

Paragraph (f) contains a special rule which is a clarification of the former rules. If payments, awards, or grants of items of incentive compensation exceed the amount determined by application of the terms of the plan itself, then even if this amount is less than the allowable amount determined under § 152.124, the full amount paid shall be considered as paid pursuant to a new, modified, or replacement plan or practice which would be subject to any applicable rules for prior approval.

Section 152.125 Incentive compensation practices.—This section contains portions of the former § 201.75, with new material. The additions deletions and modifications are substantially parallel to those in § 152.124. The special rule in § 152.124(f) with respect to payments pursuant to an incentive compensation plan is paralleled by § 152.125(b)(1).

Section 152.126 Certain stock options.—This section contains portions of the former § 201.76, and is applicable to fiscal years beginning on or after August 29, 1973. The rules for determining the aggregate share limitation have been modified. The period for determining the total number of shares granted under a plan is terminated as of December 16, 1971. A new provision has been added in the adjustment factor in paragraph (c)(1)(iii)(B) to define the "number of employees in the plan unit on the first day of the fiscal year." Rules have also been prescribed for determining the aggregate share limitation for a plan which is approved by the Council under the provisions of § 152.128.

A new special rule in paragraph (e) provides that where a firm has two or more qualified plans, the aggregate share limitation for each plan is determined separately; however, options may be granted under any or all of the plans, so long as the total number of option grants does not exceed the total of the aggregate share limitations.

Under the provisions of former § 201.76(e), stock options not "qualified" under § 201.76(b) were treated as wages and salaries and subjected to particular valuation computations. Stock options formerly subject to § 201.76(e) are now subject to the provisions of § 152.131.

§ 152.126 has no special application to executive control groups.

Section 152.127 Sales or commission plans or practices and certain production incentive programs.—This section is essentially the same as the former § 201.77. § 152.127 has no special application to executive control groups.

Section 152.128 New or revised plans, practices, or programs.—This section contains the provisions of the former § 201.78 with no significant changes. This section is applicable to firms in the food, health, and construction industries, and to plans, practices, and programs which affect members of executive control groups.

Section 152.129 New organizations and changes in organizational form.—This section contains the provisions of the former § 201.79. There are no significant changes, although a clarifying rule in paragraph (b)(2) provides that the

incorporation of an existing proprietorship or partnership is considered the creation of a new organization rather than a change in organization form. This section is applicable to firms in the food, health, and construction industries, and to plans, practices, and programs which affect members of executive control groups.

Section 152.130 Executive control groups.—This section provides mandatory rules with respect to all firms not exempt from the requirements of the Economic Stabilization Program under subpart D or subpart E (the Small Business Exemption). Each such nonexempt firm is required to designate an executive control group, which shall consist of all officers and those employee directors whose aggregate direct remuneration exceeds \$30,000 per year. The term "firm" has a specialized definition for purposes of this section, as does "affiliated group of entities" and "parent". These definitions are set forth in paragraph (c). The membership of an executive control group need not bear any relationship to the composition of an appropriate employee unit, and the rules provided in this section are in addition to any limitations imposed under the Economic Stabilization Program on compensation to members of appropriate employee units or plan, practice, or program units.

The term "officer" is defined in paragraph (c)(1) in the same terms as in Rule 3b-2 of the U.S. Securities and Exchange Commission. Since the limitations imposed under this section apply to fiscal years, rather than to control years or to plan, practice, or program years, a new term, "fiscal base date" (the day before a fiscal year) is defined in paragraph (c)(3). The terms "base year", "base group salary", "base group salary additions", "base group salary deletions", and "base period", are defined in paragraph (c) for purposes of applying the limitations on incentive compensation set forth in paragraph (e).

Paragraph (d) contains limitations on salary increases. These limitations are based on a new concept, the "average group salary rate," which is the average annual salary per position in the executive control group. The average group salary rate is permitted to be increased by no more than 5.5% in a fiscal year, as measured against the average group salary rate in effect on the day before the fiscal year. A rule is provided in paragraph (d)(2)(ii) which requires that the average group salary rate must be adjusted to reflect the addition or deletion of positions to the executive control group. Since the average group salary rate is determined with reference to positions rather than individual employees, no exclusions for promotions are made in computing increases in the average group salary rate. Paragraph (d)(3) contains a special rule which, for purposes of applying the limitations on salary increases only, permits a firm to treat its executive control group as though the group were a separate appropriate employee unit. If this election is made, the average group salary rate computation is not applied. A base compensation rate (including fringe benefit expenditures) must be constructed, and the computation methods set forth in §§ 201.53 through 201.60 are applied, as appropriate.

Paragraph (e) sets forth limitations on incentive compensation payments, grants, or awards to members of an executive control group. These limitations are applicable only to plans or practices operating under § 152.124 or § 152.125 (including stock options subject to § 152.131, but not stock options subject to § 152.126). The limitation is applied by determining the allowable amount for the plan or practice in the usual manner, by multiplying the allowable amount by an "apportionment factor," and then multiplying the product by an "adjustment factor." The "apportionment factor" represents the share of payments, grants, or awards under the plan or practice which had been assigned to the members of the executive control group in the base period; the base period, at the election of the firm, is either the last 4 plan or practice years ending prior to November 14, 1972, for which payments were made prior to that date, or the most recent plan or practice year ending prior to August 29, 1973, for which a payment was made prior to that date. The "adjustment factor" is similar in approach to the adjustment factors provided in §§ 152.124(c)(5) and 152.125(c)(5), and its application has the effect of adjusting the limits on incentive compensation payments to correspond to growth or contraction (in terms of salary) of the executive control group since the last day of the base year. It is important to note that the adjustment factors set forth in § 152.124(c)(5) and § 152.125(c)(5) are not applied at any point in the computation of the limitations on incentive compensation under § 152.130(e).

Paragraph (f) sets forth reporting requirements for firms which derive annual sales or revenues in excess of \$250 million. This report is to be filed on forms which will be issued by the Council in the near future. Paragraph (g) requires

that firms with annual sales or revenues in excess of \$50 million must keep records sufficient to permit the filing of a complete report upon request by the Council.

Paragraph (b) permits a firm to submit an application for exception to the limitations on salary increases or incentive compensation which are established in this section. The Council will approve such an application only upon a showing of "extreme hardship" or "severe inequity."

Paragraph (i) is included in recognition of the fact that the new rules with respect to executive control groups, which apply to fiscal years, are to be made effective on a date which will necessarily not represent the start of most fiscal years. However, all salary increases and incentive compensation payments, awards, or grants made prior to August 29, 1973, in a fiscal year which ends on or after such date, are considered in applying the limitations under paragraph (d) or (e).

Section 152.131 Stock option plans deemed to be incentive compensation plans or practices subject to § 152.124 or § 152.125.—This is essentially a definitional section which relates to stock options not subject to § 152.126(b) or (c) (formerly § 201.76(a) or (b)). These stock options, which were formerly charged as wage and salary increases under § 201.76(e) and (f), are now considered to be payments pursuant to an incentive compensation plan or practice, as appropriate. While these stock options continue to be valued as before, through application of an "option premium," the amount so determined is subject to the application of an "allowable amount" limitation under § 152.124 or § 152.125, and is not considered to be an increase in the base compensation rate. Grants of § 152.131 stock options to members of executive control groups are necessarily subject to the limitations of § 152.130(e).

Section 152.132 Qualified stock bonus plans.—This section represents a policy change intended to implement the provisions of § 203(g) of the Act. The Council has determined that stock bonus plans which are qualified under § 401(a) of the Code shall be treated as qualified benefits in accordance with the provisions of § 201.59. Computations are to be made as in the case of qualified deferred profit sharing plans.

Section 152.133 Prior decisions and orders.—This section contains the provisions of former § 130.1(d), and adds in paragraph (d) a provision that prior decisions and orders which apply to members of executive control groups also remain in effect.

Section 152.134 Submissions to the Council.—This section establishes a postal address to which all submissions relating to subpart K must be sent. The address is: Office of Wage Stabilization, P.O. Box 983, Washington, D.C. 20044.

Section 152.135 Executive and variable compensation guidance.—This section contains the provisions of the former § 130.14 and Appendix B to Part 130, and is to be applied to pay adjustments that are subject to self-administration and that do not apply to members of executive control groups.

In consideration of the foregoing, it is proposed to amend Part 152 of Chapter I, Title 6, Code of Federal Regulations, as follows.

Issued in Washington, D.C. on August 29, 1973.

JOHN T. DUNLOP,
Director, Cost of Living Council.

SUBPART K—EXECUTIVE AND VARIABLE COMPENSATION

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SUBPART K—EXECUTIVE AND VARIABLE COMPENSATION

§ 152.121 *Scope.*

(a) *Purpose.*—The purpose of this subpart is to provide rules and standards to stabilize items of executive and variable compensation whether or not payable to an executive. This subpart provides standards for self-administration of those pay adjustments that are subject to the provisions of subpart B of this part. This subpart also provides standards which are to be applied with respect to pay adjustments subject to mandatory controls under this part. Further, this subpart establishes special rules which are to be applied to certain types of employees, without regard to industry. Except as provided in § 152.126(a) (2), the provisions of Subpart F of Part 201 of this title are superseded, effective August 29, 1973.

(b) *Conflict with other provisions.*—To the extent that any provision of this title is inconsistent with the provisions of this subpart, the provisions of this subpart shall control. Thus, in the area of executive base salaries and job perquisites only those existing contracts meeting the requirements of § 152.122(c) and in the area of incentive compensation plans and practices only those existing contracts meeting the requirements of § 152.122(c) and pay practices previously set forth meeting the requirements of § 152.122(f) shall be allowed to operate under the terms and conditions imposed under § 201.35 of this title.

(c) *Exception.*—The provisions of this subpart are not applicable to pay adjustments pursuant to and shall not affect the provisions of a collective bargaining agreement.

(d) *Exclusions inapplicable.*—The exclusions from adjustment computations set forth in § 201.60 of this title are inapplicable to any payment, award, or grant pursuant to an incentive compensation plan or practice or to a sales or commission plan or practice or to a production incentive program referred to in § 152.127, even if such payment, award, or grant is required to be charged as a wage and salary increase.

§ 152.122 *Definitions.*

For purposes of this subpart, the term—

(a) “Base salary” means cash remuneration paid, whether currently or deferred, to an employee by an employer on account of the performance of services.

(b) “Executive compensation” includes base salary, job perquisites, and incentive compensation.

(c) “Existing contract” means a contract with respect to employment in effect on November 13, 1971, all the elements of which have been reduced to a writing which has been signed by the employee and the employer prior to November 14, 1971.

(d) “Incentive compensation” includes the following items: Bonuses (whether payable in cash or other property); stock options; phantom stock awards (including both dividend and share units); performance share awards; employer contributions to stock purchase plans or stock bonus plans not qualified under section 401(a) of the Code or the regulations thereunder; and employer contributions to profit-sharing plans which fail to meet the requirements of section 401(a) of the Code. This term, however, does not include profit-sharing plans or stock bonus plans which meet the requirements of section 401(a) of the Code.

(e) “Job perquisite” means any item paid or furnished to or on behalf of an employee by an employer on account of the performance of services including, but not limited to, such items as reimbursement or payment by an employer of country club membership fees, dues, or other similar items; reimbursement or payment by an employer of uninsured medical expenses which are not covered by the employer’s usual insurance program with respect to such expenses; reimbursement or payment by an employer for financial consulting or advisory services relating to an employee’s personal financial affairs; the personal use of an automobile furnished by an employer; and payment by an employer for or in-kind furnishing of housing; and other such similar items.

(f) “Pay practice previously set forth” means an incentive compensation plan or practice in effect on November 13, 1971, which meets all the following requirements—

(1) The plan or practice had been communicated to the affected employees;

(2) The aggregate amount of the payment or award cannot be increased or withheld in its entirety by the exercise of any discretion;

(3) The aggregate amount of the payment or award is determined by a definite method or clear formula; and

(4) The definite method or clear formula is applied only to a wage or salary amount on a percentage or other similar basis without reference to profits, earnings, or any factor or item other than the actual wage or salary amount.

(g) "Performance share plan" means a plan—

(1) Pursuant to which phantom (or restricted) shares of employer stock are awarded to plan participants to be earned out and paid over (in stock and/or cash) at the end of an award period if a predetermined performance objective (or objectives) is achieved and a service requirement met;

(2) Which is approved by the employer's stockholders within 12 months of its adoption if awards are to be made in shares of stock;

(3) Which establishes a performance objective (or objectives) that adequately recognizes stockholders' interests;

(4) Which provides an earnout period of at least three years; and

(5) Which stipulates a maximum number of shares that may be distributed under the plan.

(h) "Plan, practice, or program unit" means the employees covered by an incentive compensation plan or practice, a sales or commission plan or practice, or a production incentive program.

(i) "Plan, practice, or program year" means the 12-month period with respect to which an incentive compensation plan or practice, a sales or commission plan or practice, or a production incentive program operates.

(j) "Wages and salaries" means the same as under § 152.2 except that items constituting incentive compensation shall not be treated as wages and salaries unless otherwise provided in this subpart.

§ 152.123 *Executive salaries and job perquisites.*

(a) *In general.*—Increases in executive base salaries paid to or on behalf of and job perquisites paid or furnished to or on behalf of the employees in an appropriate employee unit during any control year shall be subject to the general wage and salary standard.

(b) *Deferred payments.*—(1) *Items deferred from an earlier year.*—An item of base salary paid to the employees in an appropriate employee unit during any control year which was earned by any such employees during an earlier control year (or it not during a control year, during the applicable 12-month period beginning on November 14 and ending on November 13) shall not be considered as an item of base salary for such employees for the control year during which such item is paid.

(2) *Items deferred to a later control year.*—An item of base salary paid to the employees in an appropriate employee unit during any control year shall include all such items which were earned by all such employees during such control year.

(3) *Definition.*—For purposes of this paragraph, an item is considered as being "earned" during the control year in which services are performed giving rise to the obligation to pay for the performance of such services whether or not such obligation is contingent upon the performance of future services or any other condition or restriction (including, but not limited to, an agreement not to compete).

(c) *Valuation of items constituting job perquisites.*—The amounts of any job perquisite shall be determined by computing:

(1) The employer's current expenditure where such expenditure constitutes the only cost of the item; otherwise

(2) The reasonable cost of providing the item, to be determined from all the facts and circumstances involved.

§ 152.124 *Incentive compensation plans.*

(a) *Applicability.* (1) *Persons subject to this section.* (i) *Firms subject to self-administration.*—The provisions of this section should be used as a guidance in the administration of incentive compensation plans by firms subject to self-administration under the provisions of subpart B of this part.

(ii) *Firms subject to mandatory controls.*—This section provides mandatory rules applicable to the administration of incentive compensation plans by firms subject to mandatory controls under the provisions of this part.

(iii) *Executive control groups.*—This section provides mandatory rules that are to be applied in determining the amounts of payments, awards, or grants under incentive compensation plans that may be made to members of an executive control group subject to the provisions of § 152.130.

(2) *Payments, awards, and grants subject to this section.*—The provisions of this section are applicable to—

- (i) Payments, awards, or grants made on or after August 29, 1973, and
- (ii) Payments, awards, or grants made with respect to plan years which end on or after August 29, 1973.

(3) *Stock options.*—The provisions of this section are not applicable to stock options subject to the provisions of § 152.126, but are applicable to stock options subject to the provisions of § 152.131.

(b) *In general.* (1) *Plans in effect on November 13, 1971.*—Subject to the provisions of this section, an employer having an established written plan with respect to items of incentive compensation in effect on November 13, 1971, where the aggregate maximum amount of incentives compensation under the plan is determined according to a definite method or clear formula, may continue to administer such a plan providing the following conditions are met—

(i) There has been a payment prior to November 14, 1971, under the plan with respect to any one of the last 3 plan years ending prior to November 14, 1971;

(ii) Administration of the plan (including application of the definite method or clear formula) is clearly in accordance with all conditions and limitations expressed therein (other than those terms and conditions as may be restricted by this section); and

(iii) Administration of the plan is in the customary manner without any deviation from such manner for purposes of circumventing the intent of the wage and salary stabilization program.

(2) *Plans established on or after November 14, 1971.*—An employer having an incentive compensation plan described in—

(i) Section 152.128(d) (with respect to adoption of new plans) and approved by the Council pursuant to § 152.128,

(ii) Section 152.129(b) (with respect to plans of new organizations) and reported to the Council pursuant to § 152.129,

shall administer such a plan subject to the provisions of paragraphs (b), (c), (d), and (f) of this section (but not including the condition contained in paragraph (b) (1) (i) of this section).

(3) *Certain other plans.*—An employer having an incentive compensation plan described in § 152.128(e) (with respect to certain expiring plans) shall administer such a plan subject to the provisions of paragraphs (b), (c), (d), and (f) of this section (but not including the condition contained in paragraph (b) (1) (i) of this section).

(c) *Computation of allowable amount.* (1) *First plan year.* (i) *Plans described in paragraph (b) (1) of this section.*—The allowable amount of any item of incentive compensation granted to the employees in a plan unit under a plan described in paragraph (b) (1) of this section with respect to the first plan year for which payment is made on or after November 14, 1971, shall not exceed an amount determined as follows: the base year amount plus 5.5 percent of such base year amount.

(ii) *Plans described in paragraph (b) (2) of this section.*—The allowable amount of any item of incentive compensation

granted to the employees in a plan unit under a plan described in paragraph (b) (2) (i) or (ii) of this section with respect to the plan year consisting of the first consecutive 12-month period under which the plan operates shall not exceed the base year amount.

(2) *Certain plan years with respect to plans operating under § 201.35.*—The allowable amount of any item of incentive compensation granted to the employees in a plan unit under a plan which operates under § 201.35 of this title shall not exceed the amount granted with respect to such plan as allowed under § 201.35 with respect to any plan year the plan operated under that section.

(3) *Subsequent plan years.*—The allowable amount of any item of incentive compensation granted to the employees in a plan unit with respect to a plan described in paragraph (b) (1), (2), or (3), of this section with respect to any plan year other than a plan year described in paragraph (c) (1) or (2) of this section shall not exceed an amount equal to the product of:

(i) The allowable amount described in paragraph (c) (1) of this section with respect to such plan, multiplied by 105.5 percent for each year of operation subsequent to the first plan year described in paragraph (c) (1) of this section, or for each year subsequent to the last plan year during which the plan was allowed to operate under § 201.35; and

(ii) The adjustment factor described in paragraph (c) (5) of this section. For purposes of paragraph (c) (3) (i) of this section the allowable amount with respect to any plan described in paragraph (b) (3) of this section shall be such amount which was granted with respect to the last plan year such plan operated under § 201.35.

(4) *Definition.*—For purposes of this paragraph, the term “base year amount” means—

(i) In the case of a plan described in paragraph (b) (1) of this section, the amount (in dollars, or where applicable, in dividend or share units) of an item of incentive compensation granted to the employees in a plan unit with respect to one of the last 3 plan years ending prior to November 14, 1971, for which there has been a payment under the plan prior to November 14, 1971;

(ii) In the case of a plan described in paragraph (b) (2) (i) of this section, the amount (in dollars, or where applicable, in dividend or share units) of an item of incentive compensation established by the Pay Board or Council as the amount allowed to be granted with respect to the first consecutive 12-month period under which the plan operates; and

(iii) In the case of a plan described in paragraph (b) (2) (ii) of this section, the amount (in dollars, or where applicable, in dividend or share units) of an item of incentive compensation granted under the plan with respect to the first consecutive 12-month period under which the plan operates, provided such amount is not unreasonably inconsistent with the standards and goals of the Economic Stabilization Program.

(5) *Adjustment for change in size of plan unit.* (i) *Method.*—The adjustment factor indicated in paragraph (c) (3) of this section with respect to the change in the size of any plan unit shall be a fraction, the numerator of which is the sum of the base unit salary plus base unit salary additions, less base unit salary deletions, and the denominator of which is the base unit salary.

(ii) *Definitions.*—For purposes of paragraph (c) (5) (i) of this section, the term—

(A) “Base unit salary” means the aggregate of the base salaries of all employees in the plan unit on the last day of the base year with respect to the plan at the annual salary rate in effect with respect to each employee on such day;

(B) “Base unit salary additions” means the aggregate of the base salaries of all employees in the plan unit (except those employees added to such unit solely on account of a merger or other type of acquisition occurring on or after November 14, 1971) on the last date of the plan year for which the adjustment is being made who were not in the plan unit on the last day of the base year with respect to the plan at the annual salary rate in effect with respect to each employee on the last day of the plan year for which the adjustment is being made;

(C) “Base unit salary deletions” means the aggregate of the base salaries of all individuals who were in the plan unit on the last day of the base year with respect to the plan but not in the plan unit on the last day of the plan year for which the adjustment is being made at the annual salary rate in effect with respect to each such individual on the last day of the base year; and

(D) “Base year” means—

(1) With respect to a plan described in paragraph (b) (1) or (2) of this section the plan year used to determine the base year amount with respect to such plan; and

(2) With respect to a plan described in paragraph (b) (3) of this section the last plan year the plan operated under § 201.35 of this title.

(d) *Rules with respect to computation of allowable amount.* (1) *Deferred or delayed payments.* (i) *Items deferred or delayed from an earlier plan year.*—For purposes of computing the allowable amount of any item of incentive compensation granted with respect to any plan year, an item of incentive compensation paid to the employees in a plan unit during any plan year which was granted to any such employees with respect to an earlier plan year shall not be considered as an item of incentive compensation for such employees for the plan year during which such item is paid.

(ii) *Items deferred or delayed to a later plan year.*—For purposes of computing the allowable amount of any item of incentive compensation granted with respect to any plan year, an item of incentive compensation granted to the employees in a plan unit with respect to any plan year which is deferred or delayed to a later plan year shall be considered as an item of incentive compensation with respect to such employees for the plan year during which such item is granted.

(iii) *Granted with respect to a plan year.*—For purposes of this section, an item is granted with respect to the plan year for which the amount generated under the plan is computed whether or not such amount is paid during that year.

(iv) *Item deferred or delayed.*—For purposes of this section, an item shall be considered deferred or delayed if it is paid after the close of the plan year with respect to which granted within the meaning of paragraph (d) (1) (iii) of this section.

(2) *Amounts in excess of allowable amount.* (i) *General.*—Except as provided in paragraph (d) (2) (ii) of this section, a firm shall not pay, and employees shall not receive, without the prior approval of the Council, an amount of any item of incentive compensation in excess of the allowable amount determined pursuant to this section. The preceding sentence shall serve as guidance with respect to members of a plan unit who are not members of an executive control group (determined pursuant to § 152.130) and subject to self-administration under the provisions of subpart B of this part.

(ii) *Coeextensive appropriate employee unit and plan unit.* (A) *Coverage.*—The provisions of paragraph (d) (2) (ii) of this section are applicable to the grant of an item of incentive compensation only where the employee membership of the plan unit and to the membership of one appropriate employee unit are co-extensive.

(B) *Excess charged as wage and salary increase.*—If the amount of any item of incentive compensation granted pursuant to a plan described in paragraph (b) of this section to which paragraph (c) (1) (ii) of this section does not apply is in excess of the allowable amount of such item with respect to any plan year determined pursuant to the rules contained in paragraph (c) of this section, such excess shall be deemed to be an increase in wages and salaries with respect to the appropriate employee unit during the control year with respect to such appropriate employee unit when paid to such employees in such appropriate employee unit (or if not paid within 6 months after the end of the plan year with respect to which such amount is paid, then such amount shall be considered paid on the last day of the sixth month after the end of such plan year).

(C) *Treatment of excess.*—The amount of any excess shall be considered as an increase in wages and salaries during the control year with respect to the appropriate employee unit when paid to such employees in such appropriate employee unit (or if not paid within 6 months after the end of the plan year with respect to which such amount is paid, then such amount shall be considered paid on the last day of the sixth month after the end of such plan year). Such amount shall also be considered as a pay adjustment for purposes of the prenotification and reporting requirements of this title with respect to such appropriate employee unit when such amount is considered as wages and salaries.

(D) *Reduction of maximum permissible increase.*—Any amount in excess of an allowable amount as described in paragraph (d) (2) (ii) of this section shall not be allowed to increase the maximum permissible annual aggregate wage and salary increase with respect to the appropriate employee unit, but shall reduce the maximum permissible aggregate wages and salaries payable to such appropriate employee unit by such amount for the control year such amount is paid (or if not paid within 6 months after the end of the plan year with respect to which such amount is paid, then such amount shall be considered paid on the last day of the sixth month after the end of such plan year).

(E) *Rule with respect to phantom stock awards.*—For purposes of determining the amount of any excess with respect to phantom stock awards, each phantom dividend or share unit shall be deemed to be an actual share of stock not subject to any restriction.

(3) *Valuation of items of incentive compensation.*—The amount of an award shall be determined as follows—

(i) For phantom stock awards: In dividend or share units;

(ii) For performance share awards: Subject to prior approval pursuant to § 152.128, in dollars in an amount equal the present fair market value of the stock to be awarded assuming attainment of at least 75 percent of the performance goal (or such other percentage or amount as established by the Council) allocated evenly over the performance period under the plan;

(iii) For bonuses awarded in stock: In dollars in an amount equal to the fair market value of such stock at the time of the award regardless of any conditions or restrictions, less the amount (if any) paid for such stock by the employee;

(iv) For bonuses awarded in property other than stock: In dollars in an amount equal to the fair market value award, regardless of any conditions or of such property at the time of the award, regardless of any conditions or restrictions, less the amount (if any) paid for such property by the employee;

(v) For employer contributions in money such as contributions to stock bonus plans or profit sharing plans which do not meet the requirements of Section 401(a)

of the Code, and stock purchase plans: In dollars in an amount equal to the employer's contribution, regardless of any deferral in time of the employee's rights under such a plan or any other condition or restriction;

(vi) For employer contributions in property other than money (including the right to purchase property, such as stock, at less than the fair market value) to plans described in paragraph (d)(3)(v) of this section: In dollars in an amount equal to the fair market value of such property (less the amount of any employee contributions, if any), regardless of any conditions or limitations, any deferral in time of the employee's rights under the plan, or any other condition or restriction. Stock options not within the provisions of § 152.126 shall be valued in accordance with the provisions of § 152.131.

(e) *Rules with respect to certain plans.*—(1) Any plan described in paragraph (b)(1) of this section which fails to meet the condition of having made the payment or award required under such paragraph shall be considered as a new plan subject to the provisions of § 152.128(d) and paragraphs (b) through (d) of this section (but not including the condition contained in paragraph (b)(1)(i) of this section).

(2) Any plan described in paragraph (b)(1) of this section which meets the definition of § 152.122 (c) or (f) and operates under § 201.35 shall not operate under such paragraph (b)(1).

(3) Any plan described in paragraph (e)(2) of this section which no longer operates under § 201.35 shall be considered as an expired incentive compensation plan within the meaning of § 152.128(e) and shall operate under the applicable provisions of this subpart.

(f) *Special rule.* If the amount of payment, award, or grant of any item of incentive compensation exceeds the amount determined by application of the definite method or clear formula in the plan described in paragraph (b) of this section (even if such amount is less than the allowable amount for the plan year involved), then the total amount of such payment, award, or grant shall be considered to be pursuant to the terms of a new, modified, or replacement plan or practice subject to the provisions of § 152.128 or § 152.135, as applicable.

(g) *Application illustrated.*—The provisions of paragraph (c)(3) of this section (relating to subsequent plan years) may be illustrated by the following example:

Example: The base year amount for Corporation X is \$100,000. For the first plan year the allowable amount, computed in accordance with paragraph (c)(1) of this section, was \$105,500. Assuming no base unit salary additions or deletions requiring the use of the adjustment factor described in paragraph (c)(5), the allowable amount for the second plan year would be \$111,303 ($105,500 \times 105.5\%$). Again assuming no base unit salary additions or deletions, the allowable amount for the third plan year would be \$117,424 ($111,304 \times 105.5\%$).

§ 152.125 Incentive compensation practices.

(a) *Applicability.* (1) *Persons subject to this section.* (i) *Firms subject to self-administration.*—The provisions of this section should be used as guidance in the administration of incentive compensation practices by firms subject to self-administration under the provisions of subpart B of this part.

(ii) *Firms subject to mandatory controls.*—This section provides mandatory rules applicable to the administration of incentive compensation practices by firms subject to mandatory controls under the provisions of this part.

(iii) *Executive control groups.*—This section provides mandatory rules that are to be applied in determining the amounts of payments, awards, or grants under incentive compensation practices that may be made to members of an executive control group subject to the provisions of § 152.130.

(2) *Payments, awards, or grants subject to this section.*—The provisions of this section are applicable to—

(i) Payments, awards, or grants made on or after August 29, 1973; and

(ii) Payments, awards, or grants made with respect to practice years which end on or after August 29, 1973.

(3) *Stock options.*—The provisions of this section are not applicable to stock options subject to the provisions of § 152.126, but are applicable to stock options subject to the provisions of § 152.131.

(b) *In general.* (1) *Practices in effect on November 13, 1971.*—Subject to the provisions of this section, an employer having a practice (other than a plan described in § 152.124(b)) with respect to items of incentive compensation in effect on November 13, 1971, may continue to administer such a practice providing the following conditions are met—

(i) There has been a payment prior to November 14, 1971, under the practice as a matter of custom or habit with respect to two of the last 3 practice years ending prior to November 14, 1971 (or if the practice has been in existence less than 2 practice years ending prior to November 14, 1971, then with respect to 1 practice year ending prior to such date) ;

(ii) Administration of the practice is clearly in accordance with demonstrated past custom or habit (other than those customs or habits as may be restricted by this section) ; and

(iii) Administration of the practice is in the customary manner without any deviation from such manner for purposes of circumventing the intent of the wage and salary stabilization program.

For purposes of paragraph (b)(1) (ii) and (iii) of this section, where the aggregate maximum amount of incentive compensation under a practice is determined according to a definite method or clear formula, such method or formula shall continue to apply. Where the aggregate maximum amount of incentive compensation under a practice is not so determined the following formula shall be deemed to apply with respect to such a practice: The base year amount with respect to such practice divided by profits of the employer prior to Federal taxes with respect to such base year. The formula so deemed to apply shall continue to apply for purposes of computing the aggregate amount of incentive compensation. If the amount of payment, award, or grant of any item of incentive compensation pursuant to a practice described in this paragraph exceeds the amount determined by application of the formula set forth in this paragraph (even if such amount is less than the allowable amount for the practice year involved), then the total amount of such payment, award, or grant shall be considered pursuant to the terms of a new, modified, or replacement practice subject to the provisions of § 152.128 or § 152.135, as applicable.

(2) *Practices established on or after November 14, 1971.*—An employer having an incentive compensation practice described in—

(i) Section 152.128(d) (with respect to adoption of new practices) and approved by the Council pursuant to § 152.128, or

(ii) Section 152.128(b) (with respect to practices of new organizations) and reported to the Pay Board or Council shall administer such a practice subject to the provisions of paragraphs (b) through (d) of this section (but not including the condition contained in paragraph (b)(1)(i) of this section).

(3) *Certain other practices.*—An employer having an incentive compensation practice described in § 152.128(e) (with respect to certain expiring practices) shall administer such a practice subject to the provisions of paragraphs (b) through (d) of this section (but not including the condition contained in paragraph (b)(1)(i) of this section).

(c) *Computation of allowable amount.* (1) *First practice year.* (i) *Practices described in paragraph (b)(v) of this section.*—The allowable amount of any item of incentive compensation granted to the employees in a practice unit under a practice described in paragraph (b)(1) of this section with respect to the first practice year for which payment is made on or after November 14, 1971, shall not exceed an amount determined as follows: the base year amount plus 5.5 percent of such base year amount.

(ii) *Practices described in paragraph (b)(2) of this section.*—The allowable amount of any item of incentive compensation granted to the employees in a practice unit under a new or revised practice described in paragraph (b)(2) (i) or (ii) of this section with respect to the practice year consisting of the first consecutive 12-month period under which the practice operates shall not exceed the base year amount.

(2) *Certain practice years with respect to practices operating under § 201.35.*—The allowable amount of any item of incentive compensation granted to the employees in a practice unit under a practice which operates under section § 201.35 of this title shall not exceed the amount granted with respect to such practice as allowed under § 201.35 with respect to any practice year the practice operated under that section.

(3) *Subsequent practice years.*—The allowable amount of any item of incentive compensation granted to the employees in a practice unit with respect to a practice described in any one of paragraphs (b)(1) through (3) of this section with respect to any practice year other than a practice year described in paragraph (c)(1) or (2) of this section shall not exceed an amount equal to the product of:

(i) The allowable amount described in paragraph (c) of this section with respect to such practice multiplied by 105.5 percent for each year of operation

subsequent to the first practice year described in paragraph (c)(1) of this section, or for each year subsequent to the last practice year in which the practice was allowed to operate under § 201.35; and

(ii) The adjustment factor described in paragraph (c)(5) of this section.

For purposes of paragraph (c)(3)(i) of this section, the allowable amount with respect to any practice described in paragraph (b)(3) of this section shall be such amount which was granted with respect to the last practice year such practice operated under § 201.5.

(4) *Definition.*—For purposes of this paragraph the term “base year amount” means—

(i) In the case of a practice described in paragraph (b)(1) of this section, the amount (in dollars, or where applicable, in dividend or share units) of an item of incentive compensation granted to the employees in a practice unit with respect to one of the last 3 practice years ending prior to November 14, 1971, for which there has been a payment under the practice prior to November 14, 1971;

(ii) In the case of a practice described in paragraph (b)(2)(i) of this section, the amount (in dollars, or where applicable, in dividend or share units) of an item of incentive compensation established by the Pay Board or Council as the amount allowed to be granted with respect to the first consecutive 12-month period under which the practice operates; and

(iii) In the case of a practice described in paragraph (b)(2)(ii) of this section, the amount (in dollars, or where applicable, in dividend or share units) of an item of incentive compensation granted under the practice with respect to the first consecutive 12-month period under which the practice operates, provided such amount is not unreasonably inconsistent with the standards and goals of the Economic Stabilization Program.

(5) *Adjustment for change in size of practice unit.* (i) *Method.*—The adjustment factor referred to in paragraph (c)(3) of this section with respect to the change in the size of any practice unit shall be a fraction, the numerator of which is the sum of the base unit salary plus base unit salary additions, less base unit salary deletions, and the denominator of which is the base unit salary.

(ii) *Definitions.*—For purposes of paragraph (c)(5)(i) of this section, the term—

(A) “Base unit salary” means the aggregate of the base salaries of all employees in the practice unit on the last day of the base year with respect to the practice at the annual salary rate in effect with respect to each employee on such day;

(B) “Base unit salary additions” means the aggregate of the base salaries of all employees in the practice unit (except those employees added to such unit solely on account of a merger or other type of acquisition occurring on or after November 14, 1971) on the last day of the practice year for which the adjustment is being made who were not in the practice unit on the last day of the base year with respect to the practice at the annual salary rate in effect with respect to each employee on the last day of the practice year for which the adjustment is being made;

(C) “Base unit salary deletions” means the aggregate of the base salaries of all individuals who were in the practice unit on the last day of base year with respect to the practice but not in the practice unit on the last day of the practice year for which the adjustment is being made at the annual salary rate in effect with respect to each such individual on the last day of the base year; and

(D) “Base year” means—

(1) With respect to a practice described in paragraph (b)(1) or (2) of this section the practice year used to determine the base year amount with respect to such practice; and

(2) With respect to a practice described in paragraph (b)(3) of this section the last practice year the practice operated under § 201.35.

(d) *Rules with respect to computation of allowable amount.*—(1) *Deferred or delayed payments.*—(i) *Items deferred or delayed from an earlier practice year.*—For purposes of computing the allowable amount of any item of incentive compensation granted with respect to any practice year, an item of incentive compensation paid to the employees in a practice unit during any practice year which was granted to any such employees with respect to an earlier practice year shall not be considered as an item of incentive compensation for such employees with respect to the practice year during which such item is paid.

(ii) *Items deferred or delayed to a later practice year.*—For purposes of computing the allowable amount of any item of incentive compensation granted with

respect to any practice year, an item of incentive compensation granted to the employees in a practice unit with respect to any practice year which is deferred or delayed to a later practice year shall be considered as an item of incentive compensation for such employees for the practice year during which such item is granted.

(iii) *Granted with respect to a practice year.*—For purposes of this section, an item is granted with respect to the practice year for which the amount generated under the practice is computed whether or not such amount is paid during such year.

(iv) *Item deferred or delayed.*—For purposes of this section, an item shall be considered deferred or delayed if it is paid after the close of the practice year with respect to which granted within the meaning of paragraph (d) (1) (iii) of this section.

(2) *Amounts in excess of allowable amount.* (i) *General.*—Except as provided in paragraph (d) (2) (ii) of this section, a firm shall not pay and employees shall not receive, without the prior approval of the Council, an amount of any item of incentive compensation in excess of the allowable amount, determined pursuant to this section. The preceding sentence shall serve as guidance with respect to members of a practice unit who are not members of an executive control group (determined pursuant to § 152.130) and who are subject to self-administration under the provisions of subpart B of this part.

(ii) *Coextensive appropriate employee unit and practice unit.* (A) *Coverage.*—The provisions of this subdivision (ii) are applicable to the grant of an item of incentive compensation only where the employee membership of the practice unit and to the membership of one appropriate employee unit are coextensive.

(B) *Excess charged as wage and salary increase.*—If the amount of any item of incentive compensation granted pursuant to a practice described in paragraph (b) of this section to which paragraph (c) (1) (ii) of this section does not apply is in excess of the allowable amount of such item with respect to any practice year determined pursuant to the rules contained in paragraph (c) of this section, such excess shall be deemed to be an increase in wages and salaries with respect to the appropriate employee unit during the control year with respect to such appropriate employee unit when paid to such employees in such appropriate employee unit (or if not paid within 6 months after the end of the practice year with respect to which such amount is paid, then such amount shall be considered paid on the last day of the sixth month after the end of such practice year).

(C) *Treatment of excess.*—The amount of any excess shall be considered as an increase in wages and salaries during the control year with respect to the appropriate employee unit when paid to such employees in such appropriate employee unit (or if not paid within 6 months after the end of the practice year with respect to which such amount is paid, then such amount shall be considered paid on the last day of the sixth month after the end of such practice year). Such amount shall also be considered as a pay adjustment for purposes of the prenotification and reporting requirements of this title with respect to such appropriate employee unit when such amount is considered as an increase in wages and salaries.

(D) *Reduction of maximum permissible increase.*—Any amount in excess of an allowable amount as described in paragraph (d) (2) (ii) of this section shall not be allowed to increase the maximum permissible annual aggregate wage and salary increase with respect to the appropriate employee unit, but shall reduce the maximum permissible aggregate wages and salaries payable to such appropriate employee unit by such amount for the control year such amount is paid (or if not paid within 6 months after the end of the plan year with respect to which such amount is paid, then such amount shall be considered paid on the last day of the sixth month after the end of such plan year).

(E) *Rule with respect to phantom stock awards.*—For purposes of determining the amount of any excess with respect to phantom stock awards, each phantom dividend or share unit shall be deemed to be an actual share of stock not subject to any restriction.

(3) *Valuation of items of incentive compensation.*—Items of incentive compensation shall be valued according to the provisions of § 152.124(d) (3).

(e) *Rules with respect to certain practices.*—(1) Any practice described in paragraph (b) (1) of this section which fails to meet the condition of having made the payment or award required under such paragraph shall be considered as a new practice subject to the provisions of § 152.128(d) and paragraphs

(b) through (d) of this section (but not including the condition contained in paragraph (b) (1) (i) of this section).

(2) Any practice described in paragraph (b) (1) of this section which meets the definition of § 152.122 (c) or (f) and operates under § 201.35 shall not operate under such paragraph (b) (1).

(3) Any practice described in paragraph (b) (2) of this section which no longer operates under § 201.35 shall be considered as an expired incentive compensation practice within the meaning of § 152.128(e) and shall operate under the applicable provisions of this subpart.

§ 152.126 *Certain stock options.*

(a) *Applicability.* (1) *Persons subject to this section.* (i) *Firms subject to self-administration.*—The provisions of this section should be used as guidance in the administration of stock option plans by firms subject to self-administration under the provisions of subpart B of this part.

(ii) *Firms subject to mandatory controls.*—This section provides mandatory rules applicable to the administration of stock option plans by firms subject to mandatory controls under the provisions of this part.

(2) *Plans subject to this section.*—The provisions of this section are effective with respect to fiscal years beginning on or after August 29, 1973. The provisions of § 201.76 (a) and (b) of this title remain applicable to fiscal years beginning prior to such date.

(b) *Certain existing stock options.*—Stock options granted to the employees in a plan unit in writing prior to the close of business on December 16, 1971, under a stock option plan adopted by an employer prior to November 14, 1971, and in effect on November 12, 1971, may be exercised. The grant of such options shall not count against the allowable number of shares that may be issued under new stock options granted during an employer's fiscal year pursuant to paragraph (c) (1) or (d) of this section.

(c) *Stock options not deemed to be an increase in wages and salaries.* (1) *Grant.* (i) *Plan requirements.*—New stock options under a stock option plan adopted by an employer prior to November 14, 1971, and in effect on November 13, 1971, may be granted to the employees in a plan unit under such a stock option plan but only in writing provided that such plan—

(A) Is approved by the employer's stockholders within 12 months of its adoption;

(B) Stipulates a maximum number of shares to be made available for stock option grants;

(C) Establishes and maintains the option price of shares that may be issued at not less than 100 percent of the fair market value of such shares on the date of grant of options for such shares; and

(D) Is administered in accordance with the customary manner.

(ii) *Aggregate share limitation with respect to the fiscal year beginning prior to November 14, 1972.* The allowable number of shares that may be issued under new stock options granted during an employer's fiscal year which began prior to November 14, 1972, under a stock option plan described in paragraph (c) (1) (i) of this section which meets all the requirements of that paragraph shall not exceed the number of shares determined as follows: The number of shares (adjusted to reflect stock splits and stock dividends) covered under stock options granted under such plan during the last 3 fiscal years of the employer ending prior to November 14, 1971, divided by 3: provided, however, if the plan was in effect on November 13, 1971, for at least 1 fiscal year of the employer ending prior to November 14, 1971, but less than 3 such fiscal years, the allowable number of shares that may be issued under new stock options granted during an employer's fiscal year which began prior to November 14, 1972, shall not exceed the number of shares (adjusted to reflect stock splits and stock dividends) covered under stock options granted during the existence of the plan through the end of the fiscal year ending before November 14, 1971, that such plan was in existence divided by the number of such fiscal years;

(iii) *Aggregate share limitation with respect to fiscal years beginning on or after November 14, 1972.*—Except for fiscal years of an employer covered by paragraph (d) of this section, the allowable number of shares that may be issued under new stock options granted during an employer's fiscal year beginning on or after November 14, 1972, under a stock option plan which meets all the requirements of paragraph (c) (1) (i) of this section shall not exceed the number of shares (adjusted to reflect stock splits and stock dividends) determined:

(A) By dividing the total number of shares covered under stock options granted under such plan prior to the close of business on December 16, 1971, by the number of fiscal years during which the plan operated prior to the close of business on December 16, 1971; and

(B) By multiplying the number determined in paragraph (c) (1) (iii) (A) of this section by a fraction, the numerator of which is the number of employees in the plan unit on the first day of the fiscal year with respect to which the allowable number of shares is determined and the denominator of which is the average number of employees in the plan unit during the fiscal years the plan operated prior to the fiscal year for which the allowable number of shares is determined. The term "number of employees in the plan unit on the first day of the fiscal year" means the number of employees who held options during the immediately preceding fiscal year, less the number of employees who became ineligible to receive options during such preceding fiscal year because of termination or transfer, plus those employees to whom, in accordance with past practice, the employer intends to grant options during the fiscal year who were not eligible to receive option grants during the immediately preceding fiscal year because of tenure, position, salary level, or similar eligibility requirement. For purposes of computing the average number of employees in the plan unit, the plan unit shall be deemed to consist of all employees at the end of each fiscal year of the employer during which the plan operates who held options granted under such plan or who exercised options which had been granted under such plan.

(2) *Exercise*.—New stock options covering shares within the applicable aggregate share limitations of this paragraph and paragraph (d) of this section under a stock option plan which meets all the requirements of paragraph (c) (1) (i) of this section may be exercised by the employees in a plan unit under such a stock option plan.

(3) *Excess*.—Options for shares in excess of the aggregate share limitation with respect to new stock options granted during an employer's fiscal year determined according to the rules contained in paragraph (c) (1) of this section (or where applicable under paragraph (d) of this section) under a stock option plan which meets all the requirements of paragraph (c) (1) (i) of this section shall not be granted without the prior approval of the Council pursuant to § 152.128 and options granted without such approval shall not be exercised unless prior approval has been obtained.

(d) *Rules for determining aggregate share limitation with respect to certain existing and new plans*—(1) *Certain plans in effect on November 13, 1971*.—For purposes of determining the allowable number of shares that may be issued under new stock options granted during an employer's fiscal year under a stock option plan described in paragraph (c) (1) (i) of this section if any plan was—

(i) In effect on November 13, 1971, and no stock options were granted during the life of the plan prior to the employer's fiscal year beginning on or after November 14, 1972, the allowable number of shares that may be issued under new stock options granted during an employer's fiscal year beginning on or after November 14, 1972, shall not exceed 25 percent of the number of shares (adjusted to reflect stock splits and stock dividends) authorized for stock options at the time the plan was adopted, or, if amended to increase share authorization, at the time last amended. After such fiscal year, the aggregate share limitation, computed as though the plan were subject to the provisions of paragraph (d) (2) (ii) of this section shall apply.

(ii) In effect on November 13, 1971, for less than a full fiscal year of the employer, (A) the allowable number of shares that may be issued under new stock options granted during an employer's fiscal year beginning prior to November 14, 1972, shall not exceed the greater of the number of shares (adjusted to reflect stock splits and stock dividends) subject to options actually granted prior to November 14, 1971, during such period of less than a full fiscal year, or 25 percent of the number of shares authorized for stock options during the life of the plan, and (B) the allowable number of shares (adjusted to reflect stock splits and stock dividends) that may be issued under new stock options pursuant to such plan during an employer's fiscal year beginning on or after November 14, 1972, shall be determined pursuant to the provisions of paragraph (d) (1) (i) of this section or shall be computed as though the plan were subject to the provisions of paragraph (d) (2) (ii) of this section, whichever is applicable.

(iii) In effect on November 13, 1971, for three or more fiscal years of the employer ending prior to November 14, 1971, and no stock options were granted during the 3 fiscal years ending before such date, (A) the allowable number of shares that may be issued under new stock options granted during an employer's

fiscal year beginning prior to November 14, 1972, shall not exceed 25 percent of the number of shares (adjusted to reflect stock splits and stock dividends) authorized for stock options but not granted during the life of the plan; and (B) the allowable number of shares that may be issued under new stock options pursuant to such plan during an employer's fiscal year beginning on or after November 14, 1972, shall be determined pursuant to the provisions of paragraph (d) (1) (i) of this section or shall be computed as though the plan were subject to the provisions of paragraph (d) (2) (ii) of this section, whichever is applicable.

(2) *Plans approved pursuant to § 152.128.*—The allowable number of shares that may be issued under new stock options granted under a stock option plan which is approved pursuant to § 152.128 and which meets all the requirements of paragraph (c) (1) (i) of this section shall be:

(i) For the first fiscal year grants are made pursuant to such plan approval the number of shares established by the Pay Board or Council as the aggregate share limitation.

(ii) For each subsequent fiscal year the aggregate share limitation for the first fiscal year multiplied by the adjustment factor established in paragraph (c) (1) (iii) (B) of this section. For the purposes of this computation the plan unit for the first fiscal year the plan operated shall be deemed to consist of all employees who held options at the end of, or exercised options during such fiscal year. The plan unit on the first day of the fiscal year with respect to which the allowable number of shares is determined shall be the plan unit for the first fiscal year the plan operated plus those employees that the employer intends to grant options to during the fiscal year described in this paragraph who were not eligible to receive option grants during the first fiscal year because of tenure, position, salary level or similar eligibility standard, less those employees who terminate employment or are transferred to positions in which they become ineligible for options under the plan.

(3) *Plans reported pursuant to § 152.129.*—The allowable number of shares that may be issued under new stock options granted under a stock option plan which was reported to the Council pursuant to § 152.129 and which meets all the requirements of paragraph (c) (1) (i) of this section shall be: (i) For the first fiscal year grants are made with respect to the reported plan, the number of shares reported as to be covered by grants during such fiscal year, provided such grants are not for the purpose of circumventing the intent of the wage and salary stabilization program and are not unreasonably inconsistent with the standards and goals of the Economic Stabilization Program; and (ii) for each fiscal year thereafter, using the number of shares reported for the first fiscal year (and not disapproved by the Council) as the aggregate share limitation for the first fiscal year, and computing the aggregate share limitations for subsequent fiscal years as though the plan were subject to the provisions of paragraph (d) (2) (ii) of this section.

(4) *Plans described in § 152.120.*—The allowable number of shares that may be issued under new stock options granted under a stock option plan which is described in § 152-128(e) and which meets all the requirements of paragraph (c) (1) (i) of this section shall be: (i) For any fiscal year the plan operates under § 201.35, the number of shares allowed to be covered by grants under § 201.35; and (ii) for each fiscal year thereafter the number of shares determined pursuant to paragraph (c) (1) (iii) of this section if the plan operated for 3 or more fiscal years which ended prior to the close of business on December 16, 1971, or, if the plan did not operate for such period, determined as though the provisions of paragraph (d) (2) (ii) of this section were applicable, using the number of shares granted during the last fiscal year the plan operated under § 201.35 as the aggregate share limitation for the first fiscal year.

(e) *Special rules.*—(1) For purposes of determining the allowable number of shares to be issued under new stock options during an employer's fiscal year pursuant to paragraphs (c) or (d) of this section the term "fiscal year" means the 12 month period constituting the employer's fiscal year. Parts of such a fiscal year shall be measured in months, such months constituting twelfths of a fiscal year. Parts of such a month shall be counted as a full month.

(2) For purposes of this paragraph the term "new stock option" shall include—(i) an option not previously granted with respect to shares covered under a stock option plan regardless of whether the shares covered under such new option were previously covered under another stock option, and (ii) an option previously granted where the exercise period with respect to such option is modified.

(3) Where an employer has two or more plans which meet all the requirements of paragraph (c)(1)(i) of this section, the aggregate share limitation applicable to each plan shall be determined separately; however, options may be granted pursuant to any or all of the plans if the total shares subject to option grants during the fiscal year do not exceed the sum of the aggregate share limitations applicable to the several plans.

(f) *Other stock options.*—For rules with respect to the treatment of stock options which are not within the provisions of paragraph (b) or (c) of this section, see § 152.131.

(g) *Rules with respect to certain plans.*—(1) Stock options granted under a stock option plan described in paragraph (c)(1)(i) of this section which meets the definition of § 152.122(e) or (f) and operates under § 201.35 shall not operate under such paragraph (c)(1).

(2) Any plan described in paragraph (g)(1) of this section, which no longer operates under § 201.35, shall be considered as an expired stock option plan within the meaning of § 152.128(e) and shall operate under the applicable provisions of this subpart.

§ 152.127 Sales or commission plans or practices and certain production incentive programs.

(a) *Applicability.*—(1) *Firms subject to self-administration.* The provisions of this section should be used as guidance in the administration of sales or commission plans and practices and production incentive programs by firms subject to self-administration under the provisions of subpart B of this part.

(2) *Firms subject to mandatory controls.*—This section provides mandatory rules applicable to the administration of sales or commission plans and practices and production incentive programs by firms subject to mandatory controls under the provisions of this part.

(b) *In general.* (1) *Established plans, practices, or programs.*—A sales or commission plan or practice established and in effect on November 13, 1971, or a production incentive program established, and in effect on such date may continue to operate in accordance with its provisions and subject to the provisions of this chapter. Generally, such plans, practices, or programs are those which directly reflect the performance of the employee participant in the form of sales or production output. Thus, for example, an incentive award related to profits is generally not a sales or commission plan or practice or a production incentive program within the meaning of this section. A plan, practice, or program under which payments, awards, or grants are based on sales or production output does not operate under this section if the plan, practice, or program unit includes employees (e.g., top management) whose primary responsibilities are not directly related to sales or production output.

(2) *New plans, practices, or programs.*—An employer having a sales or commission plan or practice or a production incentive program described in § 152.128(d) (with respect to new plans, practices, or programs), and approved by the Council pursuant to § 152.128 or described in § 152.129(b) (with respect to new organizations) and reported to the Council pursuant to § 152.129 shall administer such a plan, practice, or program subject to the provisions of this chapter.

(c) *Change in method of calculating earnings.*—Amounts paid under a plan, practice, or program described in paragraph (b) of this section shall not be considered as an increase in wages and salaries with respect to the appropriate employee units of the employees participating in the plan, practice, or program units unless there has been a change in the method of calculating the earnings under such a plan, practice, or program resulting in an increase in the aggregate amount of compensation with respect to such plan, practice, or program unit for the plan, practice, or program year such change occurs. Thus, a downward revision of the rate or formula with respect to a plan, practice, or program where there is an increase in the aggregate amount of compensation attributable to factors unrelated to the change in rate or formula, such as an increase in volume, either in dollars or units, under such plan, practice, or program, does not result in an increase with respect to the appropriate employee units of the employees participating in the plan, practice, or program unit.

(d) *Increases in wages and salaries.*—The amount of the increase in wages and salaries described in paragraph (c) of this section shall be deemed to be an increase in wages and salaries with respect to the appropriate employee units of the employees participating in the plan, practice, or program unit. Such increase shall be apportioned to the appropriate employee units of the employees

participating in the plan, practice, or program unit. The amount of such increase which shall be apportioned to an appropriate employee unit shall be determined when the amount constituting the increase is paid as follows: The number of employees in an appropriate employee unit who are participating in such a plan, practice, or program unit multiplied by a fraction, the numerator of which is the amount of the increase and the denominator of which is the number of employees in the plan, practice, or program unit. The amount so apportioned to each appropriate employee unit with respect to any plan, practice, or program year such amount is paid (or if not paid, the control year such amount would have been paid had such amount been paid). Such amount shall also be considered as a pay adjustment for purposes of the prenotification and reporting requirements of this title with respect to each such appropriate employee unit when such amount is considered as an increase in wages and salaries. Such amount shall not be allowed to increase the maximum permissible annual aggregate wage and salary increase with respect to an appropriate employee unit, but shall reduce the maximum permissible aggregate wages and salaries payable to an appropriate employee unit by such amount for the control year such amount is paid. For purposes of this section, a plan, practice, or program without a specified plan, practice, or program year shall be considered as operating during the 12-month period beginning on November 14 and ending on November 13.

(e) *Certain productivity programs.*—Notwithstanding the provisions of this section and §§ 152.128 and 152.129, any productivity incentive program described in § 201.61 of this title shall be governed by the provisions of that section.

§ 152.128 *New or revised plans, practices, or programs.*

(a) *Scope.* (1) *Firms subject to self-administration.*—With respect to firms subject to the provisions of subpart B of this part, the provisions of this section are applicable to incentive compensation plans and practices, sales or commission plans and practices, and production incentive programs which apply to or affect one or more members of an executive control group (as determined pursuant to § 152.130).

(2) *Firms subject to mandatory controls.*—With respect to firms subject to mandatory controls under this part, the provisions of this section are applicable to all incentive compensation plans and practices, sales or commission plans and practices, and production incentive programs.

(b) *Replacement of existing plans, practices, or programs.*—(1) An employer may, without the approval of the Council, adopt a new incentive compensation plan or practice, sales or commission plan or practice, or production incentive program replacing such a plan, practice, or program operating under the provision of this subpart which has lapsed or terminated on account of the operation of time only when such new plan, practice, or program does not increase the aggregate amount of compensation that would have been granted (whether or not currently) the plan, practice, or program unit had the replaced plan, practice, or program not lapsed or terminated on account of the operation of time. Such new plan, practice, or program shall continue to operate under the applicable provisions of this subpart. Thus, an incentive compensation plan in effect on November 13, 1971, described in § 152.124(b)(1) and operating under § 152.124 which is replaced under the provisions of this subparagraph shall continue to operate under § 152.124 (including any limitations with respect to the allowable amount with respect to such plan applicable prior to replacement).

(2) Replacement of an existing plan, practice, or program other than a replacement described in paragraph (b)(1) of this section shall be submitted to the Council for prior approval pursuant to paragraph (d) of this section.

(3) For purposes of paragraph (b)(1) of this section, a stock option plan under which all of the authorized shares have been the subject of option grants shall be considered as having lapsed or terminated on account of the operation of time.

(c) *Modification or revision of existing plans, practices, or programs.*—(1) An employer may, without the approval of the Council modify or revise an incentive compensation plan or practice operating under the provisions of this subpart only when such modified or revised plan or practice does not increase the aggregate amount of compensation that would have otherwise been granted (whether or not currently) a plan or practice unit under the plan or practice without taking such modification or revision into account.

(2) Any modification or revision of an incentive compensation plan or practice not described in paragraph (c)(1) of this section shall be submitted to the

Council for prior approval. Modifications or revisions requiring such approval include the reduction of performance goals or targets from those in the base year under an incentive compensation plan or practice, the decrease in the price under a stock option plan at which a stock option may be exercised, and the alteration of eligibility requirements for participation in an incentive compensation plan or practice which would increase the number of employees eligible to participate in the plan or practice unit.

(3) For the treatment of a modification or revision of a sales or commission plan or practice or a production incentive program resulting in an increase in the aggregate amount of compensation that would otherwise have been granted (whether or not currently), see § 152.127.

(d) *Adoption of new plans, practices, or programs*—(1) *Approval*. An employer may adopt a new incentive compensation plan or practice, sales or commission plan or practice, or production incentive program where such a plan, practice, or program did not exist prior to November 14, 1971, only upon the prior approval of the Council and under such terms and conditions as may be imposed by the Council. In the case of a stock option plan requiring the prior approval of the Council, no stock options shall be granted in anticipation of or subject to such approval.

(2) *Performance share plans*.—An employer may utilize the valuation for performance share awards set forth in § 152.124(d)(3)(ii) only upon the prior approval of the Council (pursuant to paragraph (d)(1) of this section) of a performance share plan under which performance share awards are to be granted, and subject to such terms and conditions as may be imposed by the Council.

(e) *Rules with respect to certain expired plans, practices, and programs*.—Any plan, practice, or program which meets the definitions of § 152.122(c) or (f) and operated under the provisions of § 201.35 of this title, but which no longer operates under such section shall be allowed to operate only as provided under the provisions of this subpart; provided, however, that to the extent incentive compensation attributable to such plans, practices, or programs is not treated as wages and salaries, or as an increase thereto, under the provisions of this subpart such compensation shall not be included in computing the base compensation rate of any appropriate employee unit of which employees in the plan unit are a part. Thus, for example, items granted under an incentive compensation plan described in § 152.124(b)(1) which meets the definition of § 152.122(c) or (f) and operated under § 201.35 are not treated as an increase in wages and salaries and are not included in computing the base compensation rate of any appropriate employee unit of which employees in the plan or practice unit are a part.

(f) *Rules with respect to plans, practices, or programs described in paragraph (b), (c), or (d) of this section*.—A new plan, practice, or program adopted pursuant to paragraph (b) or (d) of this section or a plan, practice, or program modified or revised pursuant to paragraph (c) of this section or allowed to operate pursuant to paragraph (e) of this section shall comply with other relevant sections of this subpart applicable to plans, practices, or programs in effect on November 13, 1971.

(g) *Criteria*.—In considering applications for approval pursuant to the provisions of this section, or for exceptions from the provisions of this section or other provisions of this subpart, the Council will review the facts and circumstances of each case and utilize the criteria set forth in § 201.30 of this title as such may be applicable.

§ 152.129 *New organizations and changes in organizational forms.*

(a) *Scope*. (1) *Firms subject to self-administration*.—With respect to firms subject to the provisions of subpart B of this part, the provisions of this section are applicable to incentive compensation plans and practices, sales or commission plans and practices, and production incentive programs which apply to or affect one or more members of an executive control group (as determined pursuant to § 152.130).

(2) *Firms subject to mandatory controls*.—With respect to firms subject to mandatory controls under this part, the provisions of this section are applicable to all incentive compensation plans and practices, sales or commission plans and practices, and production incentive programs.

(b) *New organizations*. (1) *General*.—Any business, enterprise, partnership, corporation, association, or any other organization organized or established on or after November 14, 1971, which is not a successor to any such organization in

existence before such date, may establish incentive compensation plans or practices, sales or commission plans or practices, or production incentive programs provided that within 90 days after establishment of such business, enterprise, partnership, corporation, association, or other organization, all such plans, practices, or programs shall be filed in report form with the Council. The report filed shall in detail describe such plans, practices, of programs including the amount of each item of actual or anticipated compensation (including items described in § 152.123) with respect to each appropriate employee unit (or, where appropriate, the employees in such unit). Also, where available, this description shall include compensation levels of appropriate employee units (or, where appropriate, the employees in such unit) in comparable jobs in nearby firms. The report filed shall also demonstrate that the establishment of the entity and such plans, practices, or programs was not for the purpose of circumventing the intent of the wage and salary stabilization program and are not unreasonably inconsistent with the standards and goals of the Economic Stabilization Program.

(2) *Incorporation of an existing proprietorship or partnership.*—For purposes of this section, the incorporation of an existing proprietorship or partnership shall be treated as the creation of a new organization subject to the provisions of this paragraph, and not as a change in organization form subject to the provisions of paragraph (c) of this section.

(c) *Changes in organization form (other than mergers and similar reorganizations).*—If an employer is doing business in a particular organizational form and thereafter reorganizes and conducts its business in a different organizational form and, before, after, or as part of and on account of such reorganization establishes new incentive compensation plans or practices, sales or commission plans or practices, or production incentive programs which are successors to plans, practices, or programs in effect before such reorganization and which operate under the provisions of this subpart, it shall, within 90 days after such reorganization file in report form all such plans, practices, or programs with the Council. The report filed shall in detail describe such plans, practices, or programs including the amount of each item of actual or anticipated compensation (including items described in § 152.123) with respect levels of appropriate employee units (or, where appropriate, the employees in such unit). Also, when available, this description shall include compensation levels of appropriate employee units (or, where appropriate, the employees in such unit) in similar positions in the predecessor organization (or organizations) prior to the reorganization. The report filed shall also demonstrate that the reorganization and establishment of such plans, practices, or programs were not for the purpose of circumventing the intent of the wage and salary stabilization program and are not unreasonably inconsistent with the standards and goals of the Economic Stabilization Program. For purposes of this paragraph a plan, practice, or program is considered as a "successor" to another plan, practice, or program where such plan, practice, or program does not increase the aggregate amount of compensation that would have otherwise been granted (whether or not currently) a plan, practice, or program unit without taking the reorganization into account. Plans, practices, or programs which are not successor plans, practices, or programs shall be considered as new plans, practices, or programs subject to the provisions of § 152.128(d) (1).

(d) *Mergers and similar reorganizations.*—If an employer merges with, or otherwise acquires, another business, enterprise, partnership, corporation, association, or any other organization, such employer may continue its incentive compensation plans and practices, sales or commission plans and practices, and production incentive programs pursuant to the applicable provisions of this subpart and the employees of such other organization may be added to such plans, practices, or programs pursuant to the applicable provisions of this subpart. The employer may continue the incentive compensation plans and practices, sales or commissions plans and practices, and production programs of such other organizations pursuant to the applicable provisions of this subpart and the employees of the employer may be added to such plans, practices, or programs pursuant to the applicable provisions of this subpart. Plans, practices, or programs which are not successor plans, practices, or programs within the meaning of paragraph (c) of this section shall be considered as new plans, practices, or programs subject to the provisions of § 152.128(d) (1). Employers who wish to combine plans, practices, or programs on account of such a merger shall submit such combined plans, practices, or programs to the Council for prior approval.

(e) *Carryover of attributes.*—For purposes of this subpart, a change in organizational form described in paragraph (c) or (d) of this section shall not affect the applicable attributes of the employer, such as appropriate employee

units, plan, practice, or program units, plan, practice, or program years, or control years. Such attributes shall be carried over by the employer undertaking such a change in form, unless otherwise clearly required by the organizational change.

§ 152.130 *Executive control groups.*

(a) *Scope.*—This section is applicable to the pay adjustments of all firms not exempt under the provisions of subpart D or E of this part, and establishes special mandatory rules with respect to pay adjustments to members of executive control groups. The rules provided in this section are in addition to any rules provided elsewhere in this title with respect to pay adjustments to members of appropriate employee units or to members of plan, practice, or program units. To the extent that the provisions of this section are inconsistent with any other provision of this title, the provisions of this section shall control; however, see § 152.133(d) for the effect of outstanding decisions and orders.

(b) *Designation of executive control group.*—Every firm shall designate one executive control group. An executive control group may consist of employees who are members of the same appropriate employee unit (but not necessarily all of the members of the same appropriate employee unit) or members of more than one appropriate employee unit. The executive control group of a firm shall consist of—

- (1) All officers of the firm; and
- (2) All employee directors of the firm whose aggregate direct remuneration from the firm, (or in the case of an affiliated group of entities, from any or all such entities) including salary, fees, perquisites, per diem reimbursement, and other forms of remuneration, individually exceeds \$30,000 in the fiscal year.

(c) *Definitions.*—For purposes of this section—

(1) “Officer” means a president, vice president, treasurer, secretary, controller, or any other employee who performs for a firm, whether incorporated or unincorporated, functions corresponding to those performed by the foregoing officers. In the case of a firm subject to the Rules and Regulations issued by the United States Securities and Exchange Commission, the term “officer” means the same as in Rule 3b-2 of such Rules and Regulations.

(2) “Fiscal year” means a firm’s customary 12-month fiscal accounting year.

(3) “Fiscal base date” means with respect to a fiscal year, the day before the first day of such fiscal year.

(4) “Base year” means the same as in § 152.124(c) (5) (ii) (D) or § 152.125(c) (5) (ii) (D), whichever is applicable.

(5) “Base group salary” means the aggregate of the base salaries of all members of an executive control group on the last day of the base year, at the annual salary rate in effect with respect to each employee on such day.

(6) “Base group salary additions” means the aggregate of the base salaries of all members of the executive control group on the last day of a fiscal year who were not in such group on the last day of the base year, at the annual salary rate in effect with respect to each employee on the last day of the fiscal year.

(7) “Base group salary deletions” means the aggregate of the base salaries of all members of the executive control group who were in such group on the last day of the base year but who are not in such group on the last day of a fiscal year, at the annual salary rate in effect with respect to each employee on the last day of the base year.

(8) “Base period” means, at the election of a firm—

(i) The last 4 plan or practice years ending prior to November 14, 1972, for which there have been payments under an incentive compensation plan or practice prior to November 14, 1972; or

(ii) The most recent plan or practice year ending prior to August 29, 1973, for which a payment has been made prior to such date.

(9) “Firm” means the same as in § 152.2, except that in the case of an affiliated group of entities it shall mean only the parent.

(10) “Affiliated group of entities” means a parent and those entities * * *

parent.

(11) “Parent” means a firm that is not controlled, directly or indirectly, by another person unless such other person is an individual, group, or entity whose control is essentially of an investment nature. Any firm that constitutes an issuer within the meaning of Regulation 14A of the United States Securities and Exchange Commission shall in any event be deemed a parent for purposes of this section.

(d) *Limitation on salary increases.* (1) *General.*—Except as provided in paragraph (d) (3) of this section, the average group salary rate with respect to an executive control group in a fiscal year shall at no time exceed 105.5 percent of the average group salary rate determined with respect to the composition of the executive control group on the fiscal base date, computed in accordance with the provisions of paragraph (d) (2) of this section.

(2) *Computation of average group salary rate.* (i) *General.*—The average group salary rate shall be expressed in terms of dollars per year, and shall be determined by constructing a fraction, the numerator of which shall be the sum of the annual base salaries with respect to the positions in the executive control group, and the denominator of which shall be the number of positions in such group.

(ii) *Rules with respect to changes in composition of group.*—

(A) If, during a fiscal year, a position is deleted from an executive control group, the base salary for such position shall be excluded from the computation of the average group salary with respect to the fiscal base date.

(B) If, during a fiscal year, a new position is added to an executive control group, and such position is actually filled during the fiscal year, the base salary for such position shall be included in the computation of the average group salary with respect to the fiscal base date. For purposes of the preceding sentence, a position shall be considered filled only if an employee actually performs work in such position during the fiscal year. The rules in § 201.62 of this title shall apply with respect to the determination of base salary for a new position.

(C) If, during a fiscal year, solely as a result of retrospective recomputations required under paragraphs (d) (2) (ii) (A) and (B) of this section, the average group salary is determined to exceed 105.5 percent of the average group salary determined with respect to the fiscal base date, then no further salary increase may be put into effect in the executive control group with respect to the fiscal year.

(iii) *Promotions.*—For purposes of the computation of increases in the average group salary set forth in this subparagraph, no exclusion shall be made for increases attributable to promotions.

(3) *Special rule.*—For purposes of this paragraph, a firm may elect to treat an executive control group as though such group were a separate appropriate employee unit. If such an election is made, wage and salary increases in such group shall not exceed the general wage and salary standard, applied to a base compensation rate computed for such group. Such base compensation rate shall incorporate an average straight-time hourly rate determined with respect to the employees who are members of such group, and an average hourly rate of employer contributions to fringe benefits (both included and qualified) attributable to such employees. The provisions of this subparagraph shall not operate to permit any actual change of appropriate employee units and do not affect any other provisions of this part.

(e) *Limitation on incentive compensation.* (1) *General.*—Payments, awards, or grants of incentive compensation pursuant to incentive compensation plans or practices subject to the provisions of § 152.125, as applicable, and before adjustment for changes in size of plan or practice unit) and the apportionment factor for the plan or practice determined pursuant to paragraph (e) (2) of this section, multiplied by the adjustment factor for the executive control group, shall not exceed an amount which is equal to the product of the allowable amount for the plan or practice unit (determined pursuant to § 152.124 or § 152.125, as applicable) and the apportionment factor for the plan or practice determined pursuant to paragraph (e) (2) of this section, multiplied by the adjustment factor for the executive control group determined pursuant to paragraph (e) (3) of this section.

(2) *Apportionment factor.*—For purposes of this paragraph, an apportionment factor for an incentive compensation plan or practice shall be computed by constructing a fraction, the numerator of which shall be the total of payments, awards or grants pursuant to such plan or practice made to the executive control group with respect to the base period, and the denominator of which shall be the total of payments, awards, or grants pursuant to such plan or practice made to all employees in the plan, practice or program unit with respect to the base period.

(3) *Adjustment factor.*—For purposes of this paragraph, an adjustment factor for an executive control group shall be computed by constructing a fraction, the numerator of which shall be the sum of the base group salary plus base group salary additions less base group salary deletions through such fiscal year, and the denominator of which shall be the base group salary.

(f) *Reporting*.—A firm which derives annual sales or revenues in excess of \$250 million (including the sales or revenues attributable to any affiliated group of entities of which such firm is the parent) shall submit a report to the Council not later than 10 days after any payment, award, or grant of any item of incentive compensation subject to § 152.124 or § 152.125 is made with respect to a member of an executive control group. If no payments, awards, or grants are made pursuant to an incentive compensation plan or practice subject to § 152.124 or § 152.125, a firm shall submit a report to the Council not later than 30 days after the end of a fiscal year. A report submitted under this paragraph shall be submitted on forms prescribed by and pursuant to instructions issued by the Council and shall contain, with respect to the members of the executive control group—

(1) Separate listings of aggregate base salaries for the fiscal year with respect to which such payment, grant, or award is made, and all items of incentive compensation under plans or practices subject to § 152.124 or § 152.125 paid, awarded, or granted with respect to the same fiscal year;

(2) The same information for the prior fiscal year;

(3) A listing of all increases in the aggregate base salaries of members of the executive control group attributable to promotions for the fiscal year with respect to which such payment, award, or grant is made, and for the prior fiscal year; and

(4) A listing of all items of deferred compensation payable to members of the executive control group with respect to such fiscal year. In addition, such report shall include individual compensation data with respect to all directors that are members of the executive control group, identified by name and position, and with respect to the three officers, identified by name and position, whose aggregate direct remuneration most exceeds \$30,000, if any. Other officers need not be identified individually by name or position, unless such information is requested by the Council.

(g) *Recordkeeping*.—A firm which derives annual sales or revenues in excess of \$50 million (including the sales or revenues attributable to any affiliated group of entities of which such firm is the parent) shall maintain records sufficient to permit the submission of a report described in paragraph (f) of this section, upon request by the Council.

(h) *Exceptions*.—An application for exception to the limitations imposed under the provisions of paragraph (d) or (e) of this section may be submitted to the Council. Such an exception may be approved by the Council only upon a demonstration of extreme hardship or severe inequity caused by the application of such limitations.

(i) *Prior increases, payments, awards, or grants*.—Notwithstanding any other provision of this section, wage and salary increases or payments, awards, or grants subject to the provisions of this subpart, lawfully made or put into effect with respect to members of an executive control group prior to August 29, 1973, shall not constitute a violation under the Act. However, if such increases, payments, awards, or grants exceed, with respect to a fiscal year ending on or after August 29, 1973, the increase, payment, award, or grant permissible for such fiscal year under the provisions of this section, then no further increase, payment, award, or grant may be made or put into effect with respect to such fiscal year without the prior approval of the Council. Notwithstanding the preceding sentence, increases, payments, awards or grants subject to the terms of a prior decision and order issued by the Pay Board or Council are subject to the provisions of § 152.133(d).

§ 152.131 Stock option plans deemed to be incentive compensation plans or practices subject to § 152.124 or § 152.125.

(a) *Applicability*. (1) *Persons subject to this section*.—This section shall be applicable to stock option plans for all nonexempt firms whether subject to self-administration or subject to mandatory controls and to all executive control groups in the same manner as if such plans were incentive compensation plans or practices under §§ 152.124 and 152.125, respectively.

(2) *Grants and exercises subject to this section*.—This section shall be applicable to—

(i) Grants and exercises of stock options made on or after August 29, 1973; and

(ii) Grants and exercises made with respect to plan or practice years which end on or after August 29, 1973.

(b) *General*. (1) *Grant*.—Except for stock options granted pursuant to the provisions of § 152.126(b), the grant of any stock option under a stock option

plan (whether or not such plan operated under § 201.35) failing to meet all the requirements of § 152.125(c) (1) (i) where such plan—

(i) Was adopted prior to November 14, 1971, and was in effect on November 13, 1971, or

(ii) Was adopted on or after November 14, 1971, and was approved by the Pay Board or Council,

shall be deemed to be pursuant to the operation of an incentive compensation plan or practice subject to the provisions of § 152.124 or § 152.125, as appropriate. Except as provided in § 152.128(b) (with respect to replacement of stock option plans under which options covering all of the authorized shares have been granted), options under stock option plans adopted on or after November 14, 1971, shall not be granted until such plan is approved by the Council pursuant to § 152.128.

(2) *Exercise.* Except for stock options granted pursuant to the provisions of § 152.126(b), the exercise of any stock option granted under a stock option plan (whether or not such plan operates under § 201.35) failing to meet all the requirements of § 152.126(c) (1) (i) where such plan—

(i) Was adopted prior to November 14, 1971, and was in effect on November 13, 1971, or

(ii) Was adopted on or after November 14, 1971, and was approved by the Pay Board or Council,

shall be deemed to be pursuant to the operation of an incentive compensation plan or practice subject to the provisions of § 152.124 or § 152.125, as appropriate. Except as provided in § 152.128(b) (with respect to replacement of stock option plans under which options covering all of the authorized shares have been granted), options under stock option plans adopted on or after November 14, 1971, shall not be granted or exercised until such plan is approved by the Council pursuant to § 152.128.

(c) *Valuation of stock options.*—For purposes of paragraph (b) of this section the value of a stock option—

(1) When granted shall be an amount equal to the value of such option at the time of grant (without taking into account any conditions or restrictions imposed under the stock option or on the shares under option) determined as follows: the sum of the option premium plus the excess of the fair market value of the shares under option at the time of the grant over the price of the shares under the option, and

(2) When exercised shall be an amount equal to the value of such option at the time of exercise (without taking into account any conditions or restrictions imposed under the stock option or on the shares under option) determined as follows: the excess of the fair market value of the shares under option at the time of exercise over the sum of the option premium plus the fair market value of the shares under the option at the time of the grant.

For purposes of this paragraph the term “option premium” means the value of the shares under option. Such value shall be an amount equal to 25 percent of the fair market value of the shares under option at the time of grant without taking into account any conditions or restrictions imposed under the stock option or on the shares under option.

§ 152.132 *Qualified stock bonus plans.*

Stock bonus plans which meet the requirements of Section 401(a) of the Code shall not be subject to the provisions of this subpart, but shall be treated as qualified benefits in accordance with the provisions of § 201.59 of this title. Non-chargeable employer contributions to such qualified stock bonus plans shall be computed under the rules applicable to contributions to qualified deferred profit sharing plans set forth in § 201.59(f) (2) of this title.

§ 152.133 *Prior decisions and orders.*

(a) *General.* This part shall not operate to permit prospective payments, awards, or grants under an executive and variable compensation plan, practice, or program, where such plan, practice, or program is subject to a Pay Board or Council decision and order, except to the extent consistent with such decision and order.

(b) *Pay adjustments subject to self administration.* Notwithstanding the provisions of paragraph (a) of this section, a decision and order relating to executive and variable compensation, not affecting employees in the food, health services, or construction industry, shall be effective only for payments, awards, or grants made with respect to plan, practice, or fiscal years (as appropriate)

which begin prior to January 11, 1973. Where such a decision and order requires that payments, awards, or grants are to be charged as wages and salaries, and such payments, awards, or grants are made after January 10, 1973, such payments, awards, or grants are made after January 10, 1973, such payments, awards, or grants, together with any other wage and salary increases subject to voluntary controls, shall be subject to the general wage and salary standard set forth in § 152.13, unless such payments, awards, or grants are made during a control year covered by a Pay Board or Council decision and order which limits wage and salary increases paid in an appropriate employee unit which includes plan, practice, or program participants. In such latter cases, the payments, awards, or grants which are to be charged as wage and salary increases may be paid only to the extent consistent with such other decision and order, as provided in § 152.1 (b) (2).

(c) *Pay adjustments subject to mandatory controls.*—Where a decision and order relating to executive and variable compensation affecting employees in the food, health services, or construction industry, requires that payments, awards, or grants are to be charged as wages and salaries, then such payments, awards, or grants made after January 10, 1973, together with any other wage and salary increases, shall be subject to the rules for pay adjustments in the applicable industry, as set forth in this part.

(d) *Executive control groups.*—A decision and order of the Pay Board or Council issued prior to August 29, 1973, which applies to or affects members of an executive control group (determined pursuant to § 152.130), shall remain in effect with respect to payments, awards, or grants of items of incentive compensation with respect to the plan, practice, or program year covered by such decision and order, as provided in paragraphs (a), (b) and (c) of this section. Any payments, awards, or grants lawfully made pursuant to the terms of such decision and order shall not constitute a violation of the provisions of § 152.130.

§ 152.134 *Submissions to the Council.*

Any prenotification, report, or application under the provisions of this subpart must be sent to Office of Wage Stabilization, P.O. Box 983, Washington, D.C. 20044.

§ 152.135 *Executive and variable compensation guidance.*

(a) *Scope.*—The provisions of this section are applicable to pay adjustments that are subject to self-administration under the provisions of subpart B of this part, and that do not apply to or affect a member of an executive control group (determined pursuant to § 152.130).

(b) *Adjustments subject to standards.*—The rules contained in this subpart, and the guidance set forth in paragraph (c) of this section, relating to executive and variable compensation, should be used in determining whether payments, awards, or grants are charged as wage and salary increases which, when added to other wage and salary increases, are subject to the general wage and salary standard set forth in § 152.13. Stock option grants under plans which meet all the requirements of § 152.126(c) (1) (i) should not exceed the aggregate share limitation applicable to such plans, except to the extent necessary to prevent gross inequities, serious market disruptions, or localized shortages of labor. Except as provided in § 152.124(d) (2) (ii) and § 152.125(d) (2) (iii), payments, awards, or grants of items of incentive compensation pursuant to plans operating under § 152.124 or practices operating under § 152.125 should not exceed the allowable amounts determined pursuant to § 152.124(d) or § 152.125(d), as applicable, except to the extent necessary to prevent gross inequities, serious market disruptions, or localized shortages of labor.

(c) *Guidance for replacement, modified, and new executive and variable compensation plans.* (1) *General.*—The guidance set forth in this paragraph should be used by employers subject to self-administration with respect to the implementation after January 10, 1973, of replacement, modified, or new executive and variable compensation plans, practices, or programs of the types covered in this subpart. For employers subject to voluntary controls, such implementation does not require prior approval. This paragraph provides the principles, policies, and conditions that have been used by the Pay Board and Council in their consideration of such plans, practices, or programs submitted for approval during Phase II and Phase III of the Economic Stabilization Program.

(2) *Replacement incentive compensation plans or practices.*—When an employer adopts a new incentive compensation plan or practice (other than a stock option plan) replacing such a plan or practice which has lapsed or terminated on account of the operation of time, the new plan or practice is not considered

to increase wages and salaries if the aggregate amount of compensation attributable to the new plan or practice is not an increase over the aggregate amount which would have been granted under the replaced plan or practice had it not terminated. If the amount of compensation is increased over that attributable to the replaced plan or practice, the amount in excess should be treated as an increase in wages and salaries.

(3) *Modified or revised incentive compensation plans or practices.*—When an employer modifies or revises an incentive compensation plan or practice (other than a stock option plan), the modification or revision is not considered to increase wages and salaries if the aggregate amount of compensation attributable to the modified or revised plan or practice is not an increase over the aggregate amount attributable to the plan or practice had it not been modified or revised. If the amount of compensation is increased over that attributable to the plan or practice prior to modification or revision, the amount in excess should be treated as an increase in wages and salaries.

(4) *New incentive compensation plans or practices.*—When an employer adopts a new incentive compensation plan or practice (other than a stock option plan) which is neither a replacement nor modification or revision of an existing plan or practice, the amount granted with respect to the first 12 months of the operation of the plan or practice should be treated as an increase in wages and salaries. The amount so granted with respect to the first 12-month period should (within the meaning of §§ 152.124(c)(4) and 152.125(c)(4)) become the “base year amount” for such plan or practice in computing the “allowable amount” with respect to future plan years. Payments in subsequent plan years that exceed the “allowable amount” should also be considered an increase in wages and salaries.

(5) *Special rules for certain incentive compensation plans and practices.*—For purposes, paragraph (c)(4) of this section, the amount of certain types of awards should be determined as follows—

(i) *For performance share awards.*—In an amount equal to the fair market value of the stock at the time of the award assuming attainment of at least 75 percent of the performance goal allocated over the performance period.

(ii) *For phantom stock awards.*—In an amount equal to 25 percent of the fair market value of an equivalent number of actual shares of the employer at the time of the award.

(6) *Replacement stock option plans.*—If an employer subject to voluntary compliance adopts a new stock option plan which meets all the requirements of § 152.126(c)(1)(i), and the new plan replaces a stock option plan which had met those requirements but which had lapsed—

(i) On account of the operation of time, or

(ii) Because all of the authorized shares had been the subject of option grants, or

(iii) Because the authorized shares available for award were insufficient to grant options covering the applicable aggregate share limitation; then

for purposes of determining the aggregate share limitation applicable to the new plan, the new plan and the replaced plan should be treated as a single plan. If such an employer adopts a new stock option plan described in § 152.131, which replaces a prior plan that has lapsed or terminated, then the increases in wages and salaries attributable to grants and exercises of stock options under the replacement plan should be considered pursuant to the operation of an incentive compensation plan under § 152.124.

(7) *Modified or revised stock option plans.*—If an employer modifies or revises a stock option plan which meets all the requirements of § 152.126(c)(1)(i), the aggregate shares to be granted under the modified or revised plan should not exceed the aggregate shares which would have been granted under the plan had it not been modified or revised. If such an employer modifies or revises a stock option plan described in § 152.131, any increase in wages and salaries attributable to awards under such plan should be considered pursuant to the operation of an incentive compensation plan under § 152.124.

(8) *New stock option plans.*—If an employer adopts a new stock option plan which is neither a replacement nor a modification or revision and which meets all the requirements of § 152.126(c)(1)(i), the aggregate share limitation for the first fiscal year of operation should be 25 percent of the number of shares authorized for stock options at the time the plan was adopted. The aggregate share limitation for subsequent fiscal years should be determined in accordance with the provisions of § 152.126(d)(2)(ii). If such an employer adopts a new

stock option plan described in § 152.131, the increase in wages and salaries attributable to the options granted or exercised under the new plan should be considered pursuant to the operation of an incentive compensation plan under § 152.124.

(9) *Replacement sales or commission plans or practices and certain incentive programs.*—When an employer adopts a new sales or commission plan or practice or a production incentive program (other than a program described in § 201.61 of this title) replacing such a plan, practice, or program, the payments under the new plan, practice, or program are not considered to increase wages and salaries if the aggregate amount of compensation attributable to the new plan, practice, or program (using the new formula or method for determining payments) is not an increase over that which would have been granted (using the old formula or method for determining payment) under the plan, practice, or program had it not been terminated. If the amount of compensation is increased solely due to the change in formula or method for determining payments over that attributable under the replaced plan, practice, or program, the amount in excess should be treated as an increase in wages and salaries in the control year such amounts are paid, should be apportioned to the appropriate employee units of the plan, practice, or program participants as provided in § 152.127, and should be included in the respective units' base compensation for subsequent control years.

(10) *Modified or revised sales or commission plans or practices and certain incentive programs.*—When an employer modifies or revises a sales or commission plan or practice or a production incentive program (other than a program described in § 201.61 of this title), the payments under the modification or revision are not considered to increase wages and salaries if the aggregate amount of compensation attributable to the modified or revised plan, practice, or program (using the modified formula or method for determining payments) is not an increase over that which would have been granted (using the old formula or method for determining payments) under the plan, practice, or program had it not been modified or revised. If the amount of compensation is increased solely due to the change in formula or method for determining payments over that attributable under the modified or revised plan, practice, or program, the amount in excess should be treated as an increase in wages and salaries in the control year such amounts are paid, should be apportioned to the appropriate employee units of the plan, practice, or program participants as provided in § 152.127, and should be included in the respective units' base compensation for subsequent control years.

(11) *New sales or commission plans or practices and certain incentive programs.*—When an employer adopts a new sales or commission plan or practice or production incentive program (other than a program described in § 201.61 of this title), which is neither a replacement, nor modification or revision, of an existing plan, practice or program, the amount granted with respect to the new plan, practice, or program should be treated as an increase in wages and salaries in the control year such amounts are paid, should be apportioned to the appropriate employee units of the plan, practice, or program participants as provided in § 152.127, and should be included in the respective units' base compensation for subsequent control years.

[From the Federal Register, Oct. 17, 1973]

COST OF LIVING COUNCIL

[6 CFR Part 150]

PHASE IV PRICE REGULATIONS

NOTICE OF PROPOSED RULEMAKING

Notice is hereby given that, pursuant to the authority of Executive Orders 11695 and 11730, the Cost of Living Council, as part of its continuing review of the operation of price controls with respect to the petroleum industry, is considering the adoption of certain amendments to the Phase IV petroleum regulations to be effective October 31, 1973.

The proposed amendments represent substantive changes in the manner by which sellers of special petroleum products (gasoline, No. 2-D diesel fuel and No. 2 heating oil) at all sales levels must compute their selling prices for those

products. New rules governing non-product cost allocation for refiners and other technical changes are also included in these regulations. While these regulations are under consideration by the Council, price ceilings have been imposed upon all prices charged for these petroleum products at all sales levels. Notice of this ceiling price imposition appears in amendments to Part 150, published elsewhere in this edition of the FEDERAL REGISTER.

The proposed rulemaking would only change the basic rules for gasoline, No. 2-D diesel fuel and No. 2 heating oil. All other petroleum products would remain subject to the rules under which they are now controlled. These new rules are designed to establish an orderly, more simplified system by which sellers of the special petroleum products determine maximum price levels and pass through costs from one sales level to another. This new system insures that no discrimination will exist among petroleum marketers in the method of establishing prices for petroleum products. The proposed rules would in no manner alter the general principle that all increased costs of imports and domestic crude petroleum may be passed through at every level of distribution in order to encourage a maximum expansion of supplies of petroleum products.

Under this new system, the present retail price ceiling is removed and the pass-through of increased petroleum costs by refiners, resellers and retailers is limited to full penny increments. Fractional cost increases cannot be passed forward, but all increases in one cent increments may be passed through by all distributors, including retailers.

CRUDE PETROLEUM

Included in this proposed rulemaking is a technical amendment to the existing pricing rule of § 150.354 for producers of released domestic crude petroleum. Some confusion has arisen concerning the price which may be charged under the pricing formula. The new rule clarifies the formula price by stating that the lesser of either the formula price or the market price is to be the price for released crude petroleum.

REFINERS' PRICING RULES FOR SPECIAL PRODUCTS

Several changes are made in the refiners' pricing rule of § 150.358, which is renumbered as § 150.355. Sales of special products at retail are made subject to this section and old § 150.355 which contained the ceiling price rules for special products is revoked. Special product retail sales prices are measured by the ceiling price in effect on October 31, 1973, or the base price (determined in the same manner as for nonretail sales) whichever is greater, plus allowable cost increases. Upward adjustments to special product prices must be made only in one cent increments measured from the October 31 ceiling price level.

The one cent increment rule further extends to a special product sold at other than retail by a refiner, but these penny adjustments must be measured from the selling price on October 31, 1973. Downward changes in base prices for these special products must also be reflected only in whole penny adjustments from the October 31 selling price level.

An allocation formula has been included to provide for the allocation of non-product cost increases in a manner similar to that used in allocating increased costs of product in § 150.356. These new rules concern the allocation of non-product costs only at the refinery and require prenotification any time a price is to be charged in excess of a base price. A refiner's nonproduct costs incurred in other operations, such as reselling or retailing, are not includable in these cost computations. The allocation rule specifies further that price increases above base prices of special products are to be made by the penny increment to the ceiling price of October 31 for retail sales, and to the selling price of October 31 for other than retail sales. The price reduction rule is retained, with the added provision for special product price reductions to be made in one penny amounts.

REFINERS' ALLOCATION OF INCREASED PRODUCT COSTS

The allocation formula of § 150.356 is not changed by this rulemaking, although the superscript "n" is altered to more accurately represent seasonal changes. The proposed "n" would involve a "floating" three month period of the preceding year, with the middle month of the period corresponding to the current month represented in the formula by "u." The pricing rules for products refined by the refiner are modified to permit increases in special product base prices only in one cent increments to conform with the rules of new § 150.355. The rules concerning the

method of allocating cost increases computed under the general formula are clarified in § 150.356, to permit the refiner to assign such costs in the manner he considers best.

A new paragraph is inserted in this section also to add clarification and specificity in the manner for carrying over costs from one month to be recouped in a later month. For a special product, the unused cost must be applied in the subsequent month by a method that adjusts for quantity changes for that special product between the two months. Other products may bear their unused cost allocation according to the refiner's chosen method of allocation, equally applied to each class of purchaser.

RESELLERS AND RETAILERS

With the institution of a system of cost pass-through at all levels of sales, the resellers' and retailers' price rule of § 150.359 is expanded to include nonrefiners' retail sales of special products. The one penny rule is also applied for special product prices at retail and resale levels. Increased costs are added to the May 15 selling price for retail sales by one penny increments to the October 31 ceiling price and for other than retail sales by penny increments to the October 31 selling price.

A price decrease provision is added to this section, to require that prices fully reflect costs on a dollar-for-dollar basis. For special products this price decrease occurs in the same manner as the price increases.

NEW ITEM

An addition to the new item base price determination in § 150.361 is made to accommodate the new reseller rule of § 150.359. The price for a new item sold by resellers and retailers is that of the nearest comparable outlet; costs are determined by the cost of the new item when first offered for sale.

POSTING AND RECORDS

The posting rule of § 150.362 is amended to incorporate the gasoline octane posting requirement and the rule for posting maximum prices of gasoline and No. 2-D diesel fuel at retail sales. Each adjustment to these maximum prices would be reflected in the posted price.

With respect to No. 2 heating oil price increases under new § 150.355 or new § 150.359, the rule of § 150.363 is amended to include the reporting requirement previously in effect. The new rule applies to retail sales of this item and requires that reports be submitted by the fifth day after the increase is implemented.

In issuing this notice of proposed rulemaking, the Council is inviting public comment on these amended petroleum industry price control rules contemplated for the remaining term of Phase IV.

Interested persons are invited to participate in the rulemaking by submitting written data, views or arguments with respect to the proposed regulations set forth in this notice to the Executive Secretariat, Cost of Living Council, 200 M Street NW., Washington, D.C. 20508.

Comments should be identified on the outside envelope and on the document submitted with the designation "Proposed Phase IV Petroleum Amendments," and should be organized so that those comments dealing with a particular rule are on a separate page from those dealing with other rules. Ten copies should be submitted. All comments received by October 25, 1973, will be considered by the Council before final action is taken on the proposed regulations. The proposed regulations may be changed in light of the comments received. All comments received in response to this notice will be available for examination and copying by interested persons at the Cost of Living Council, 2000 M Street NW., Washington, D.C. 20508, during the hours of 9 a.m. to 5 p.m., Monday through Friday. Submissions may be inspected both before and after the ending date for comment.

(Economic Stabilization Act of 1970; as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 14, 38 FR 1489.)

In consideration of the foregoing it is proposed to amend Part 150 of Title 6 of the Code of Federal Regulations as set forth below.

Issued in Washington, D.C., on October 15, 1973.

JAMES W. McLANE,
Deputy Director,
Cost of Living Council.

Paragraph 1. The definition of "Base price" in § 150.352 is amended by changing the reference to "§ 150.358" to read "§ 150.355".

Par. 2. The definition of "Ceiling price" in § 150.352 is amended by deleting the phrase "§ 150.355 with respect to No. 2-D diesel fuel, No. 2 heating oil and gasoline and".

Par. 3. Section 150.354 is amended in the first sentence of paragraph (c) (3) to read as follows:

§ 150.354 *Ceiling price rule: Crude petroleum.*

* * * * * *

(c) *Rule.*

* * * * * *

(3) *Released crude.*—Notwithstanding paragraph (c) (1) of this section, if during a particular month new crude petroleum which could be sold at other than the ceiling price pursuant to paragraph (c) (2) of this section is produced from a property, the entire base production control level crude petroleum for that month may be sold at a price which exceeds the ceiling price provided that the maximum price charged per barrel of that base production control level crude petroleum does not exceed the lesser of (i) the current free market price for the particular quality or grade of crude petroleum as (ii) the price derived pursuant to the following:

$$P_{max} = P_c + \left[\frac{C_{pr}}{C_{bpccl}} - 1 \right] [P_m P_c]$$

Where:

P_{max} = Maximum price that may be charged for the crude petroleum (other than new crude) purchased from the property (dollars per barrel);

P_c = Ceiling price of the crude petroleum (dollars per barrel);

C_{bpccl} = Base production control level for property (barrels);

C_{pr} = Total amount of crude petroleum produced from the property during the month (barrels); and

P_m = Current free market price of the particular quality and grade of crude petroleum (dollars per barrel).

Par. 4. Section 150.355 is revised to read as follows:

§ 150.355 *Price rule: Refiners.*

(a) *Applicability.*—This section applies to each sale of a covered product which is refined by a refiner or commingled for accounting purposes with a product refined by a refiner. This section does not apply to sales of covered products by a refiner-reseller which are subject to § 150.359.

(b) *Rule.*—(1) A refiner may not charge to any class of purchaser a price for a covered product other than a special product in excess of the base price of that covered product except to the extent permitted pursuant to the provisions of paragraphs (c) through (k) of this section.

(2) With respect to a sale at retail, a refiner-retailer may not charge to any class of purchaser a price for a special product in excess of the ceiling price for that special product in effect on October 31, 1973, except to the extent that the base price of that special product exceeds the October 31, 1973, ceiling price pursuant to the provisions of paragraph (g) of this section and except to the extent that a price may be charged in excess of the base price for the item pursuant to the provisions of paragraphs (c) cost. (2) For purposes of products purchased in arms-length transactions and shipped pursuant to a transaction between affiliated entities, the purchase price at the point of origin plus the transportation cost computed by use of the accounting procedures generally accepted and consistently and historically applied by the firm concerned. (3) For purposes of products purchased in a transaction between affiliated entities and shipped pursuant to an arms-length transaction, the cost of the product computed by use of the customary accounting procedures generally accepted and consistently and historically applied by the firm concerned plus the actual transportation cost. (4) For purposes of products purchased and shipped pursuant to a transaction between affiliated entities, the costs of the product and the transportation, both computed by use of the customary accounting procedures generally accepted and consistently and historically applied by the firm concerned.

"Transactions between affiliated entities" means all transactions between entities which are part of the same firm and transactions with entities in which

the firm has a beneficial interest to the extent of entitlement of covered product by reason of the beneficial interest.

(c) *Allocation of increased costs.*—(1) *General rule.*

(i) *Special products.*—In computing base prices for sales of a special product at a particular level of distribution, a refiner may increase its May 15, 1973, selling prices to each class of purchaser each month beginning with October 1973 by an amount to reflect the increased costs of imports and increased costs of domestic crude petroleum attributable to sales of that special product at that level of distribution using the differential between the month of measurement and the month of May, 1973 provided that the amount of increased costs used in computing a base price is calculated by use of the general formula set forth in subparagraph (2) and provided that any adjustment to a May 15, 1973, selling price for a special product must be applied in full penny increments in accordance with the provisions of § 150.355(g). To the extent that a refiner does not allocate its increased costs for a special product pursuant to this provision, it may include that part of its increased costs attributable to sales of that special product at that level of distribution in computing its base prices for covered products other than special products pursuant to paragraph (c) (1) (ii) of this section.

(ii) *Other than special products.*—In computing base prices for a covered product other than a special product, a refiner may increase its May 15, 1973, selling price to each class of purchaser each month beginning with October 1973 by an amount to reflect the increased costs of imports and increased costs of domestic crude petroleum attributable to sales of covered products other than special products or sales of special products not otherwise allocated pursuant to paragraph (c) (1) (i) of this section using the differential between the month of measurement and the month of May, 1973, provided that the amount of increased costs used in computing a base price is calculated by use of the general formula set forth in paragraph (c) (2) of this section and provided that the amount of increased costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser. In apportioning the total amount of increased costs allocable to covered products other than special products, a refiner may apportion the total amount of increased costs to a particular covered product other than a special product at a particular level of distribution in whatever amount he deems appropriate.

(2) *General formula.*

$$D_{ii}^u = \frac{\left[A \times \frac{S_i^n}{S^n} + B \right] \frac{S_{ii}^n}{S_i^n}}{q_{ii}^u}$$

Where—

D = The dollar increase that can be applied to each May 15, 1973 selling price of the covered product concerned to each class of purchaser to compute the base price to each class of purchaser.

p = The unit price of a covered product other than crude petroleum. For imported products, the landed cost.

q = The quantity or volume of a covered product other than crude petroleum.

C = The unit cost of crude petroleum.

Q = The quantity or volume of crude petroleum.

$S = \sum_{i=1}^4 \sum_{j=1}^3 [p_{ij} q_{ij}]$ which is the total sales of all covered products other than crude petroleum.

$S_i = \sum_{j=1}^3 [p_{ij} q_{ij}]$ which is the total sales of a specific covered product or products other than crude petroleum.

$S_{ii} = p_{ii} q_{ii}$ which is the total sales of a specific covered product or products other than crude petroleum at a specific level of distribution.

$A = \sum_k [C_k^t Q_k^t - C_k^c Q_k^c - X^o Q_k^t - Q_k^o]$

Where

$$X^o = \frac{\sum_{k=1}^2 [C_k^o Q_k^o]}{\sum_{k=1}^2 [Q_k^o]} \text{ which is the average unit cost of crude petroleum.}$$

$$B = \sum_k p_{ik}^t q_{ik}^t - p_{ik}^o q_{ik}^o - Y^o (q_{ik}^t - q_{ik}^o)$$

Where

$$Y^o = \frac{\sum_{j=1}^3 [p_{ij}^o q_{ij}^o] \quad \sum_{j=1}^2 [p_{ij}^o q_{ij}^o (p_{ij}^o - p_{is}^o)]}{\sum_{j=1}^3 [q_{ij}^o] \quad \sum_{j=1}^2 [p_{ij}^o q_{ij}^o]}$$

The type of covered product is referenced by the subscript i :

$i=1$ represents No. 2 heating oil.

$i=2$ represents gasoline.

$i=3$ represents No. 2-D diesel fuel.

$i=4$ represents all covered products other than special products.

The category of purchaser or level of distribution is referenced by the subscript j :

$j=1$ represents sales to ultimate consumers.

$j=2$ represents sales to retailers.

$j=3$ represents sales to wholesalers.

The origin of a covered product is referenced by the subscript k :

$k=1$ represents domestic origin.

$k=2$ represents foreign origin or import.

SUPERSCRIPTS

n = The consecutive three-month period of the preceding year such that the middle month of the period corresponds to the current month.

o = The month of May 1973.

t = The month of measurement. (The month of measurement is the month preceding the current month.)

u = The current month. Quantities calculated for the current month will be estimates which should be based on the best available data.

MATHEMATICAL TERM

Σ Represents a calculation by summing with respect to the designated subscript all terms designated in the superscript.

(d) *Carryover of Unused Costs.*—(i) If in any month beginning with October 1973, a firm establishes a base price for a special product at a particular level of distribution which does not include the entire amount of the dollar increase calculated pursuant to the general formula and allowable under paragraph (c) (1) (ii) of this section the unused amount is not used to increase a May 15, 1973, selling price pursuant to paragraph (c) (1) (ii) of this section the unused portion of the dollar increase may be added to the May 15, 1973, selling price to compute the base price for that special product at that level of distribution for a subsequent month provided that the unused portion is adjusted by multiplying it by ratio that the quantity of the special product in the initial month of calculation bears to the quantity of that special product in the subsequent month of calculation.

(ii) If, in any month beginning with October 1973, a firm establishes base prices for covered products other than special products which do not reflect the entire amount of increased costs of imports and increased costs of domestic crude

petroleum calculated pursuant to the general formula and allowable under paragraph (c) (1) (ii) of this section, the total amount of those unused costs may be used to compute base prices for covered products other than special products in a subsequent month provided that the amount of the unused costs included in computing the base prices of a particular covered product other than a special product is equally applied to each class of purchaser.

(e) *Affiliated entities*.—For purposes of this section, transactions between affiliated entities may be used to calculate increased costs. Whenever a firm uses a landed cost which is computed by use of its customary accounting procedures, the Council may allocate such costs between the affiliated entities if it determines that such allocation is necessary to reflect the actual costs of those entities or the Council may disallow any costs which it determines to be in excess of the proper measurement of costs. Costs incurred in transactions in which covered products are obtained which are resold without being refined by the firm or commingled for accounting purposes may not be included in the calculation of the general formula.

Par. 6. Section 150.358 is revoked.

Par. 7. Section 150.359 is revised to read as follows :

§ 150.359 *Price rule: Resellers and retailers.*

(a) *Applicability*.—This section applies to each sale of a covered product other than a sale by a refiner which is subject to § 150.355. Sellers subject to this section are refiner-resellers, resellers, reseller-retailers and retailers.

(b) *Definitions*.—As used in this section—

“Increased costs” means the difference between the weighted average unit cost of an item in inventory during the current pricing period and the weighted average unit cost of that item in inventory on May 15, 1973. If a particular item was not in inventory on May 15, 1973, the date for computing the cost is the most recent day preceding May 15, 1973, when the seller had the item in inventory.

“Pricing period” means any time period at the close of which the seller, in accordance with its customary and historical pricing practices and at its lowest customary pricing levels would normally reprice its covered products.

(c) *Price rule*.—(1) A seller may not charge a price for any item subject to this section which exceeds the weighted average price at which the item was lawfully priced by the seller in transactions with class of purchaser concerned on May 15, 1973, plus an amount which reflects on a dollar-for-dollar basis, increased costs of the item.

(2) Notwithstanding paragraph (c) (1) of this section, with respect to special products sold at retail, the increased costs may only be added to the May 15, 1973, selling price in penny increments to the ceiling price in effect for that special product on October 31, 1973. With respect to special products sold at other than retail, the increased costs may only be added to the May 15, 1973, selling price in full penny increments to the October 31, 1973, selling price of that special product as computed in paragraph (b) (3) of § 150.355.

(3) A seller which charges a price for a covered product other than a special product which exceeds the weighted average price at which the product was lawfully priced by the seller in transactions on May 15, 1973, must decrease the price of that product whenever the increased costs in the current pricing period are less than the increased cost in the most recently completed pricing period.

(4) Notwithstanding subparagraph (c) (3) of this section with respect to a special product sold at retail, whenever the increased costs in the current pricing period are less than the increased cost in the most recently completed pricing period the seller must decrease the price of that product in full penny increments to the ceiling price in effect for that special product on October 31, 1973. With respect to a special product sold at other than retail, whenever the increased costs in the current pricing period are less than the increased costs in the most recently completed pricing period the seller must decrease the price of that product in full penny increments to the October 31, 1973, selling price computed pursuant to the provisions of paragraph (b) (3) of § 150.355. Any other adjustment in price for a special product sold at other than retail below the October 31, 1973 selling price or other authorized price must be applied in full penny increments.

(5) In computing the May 15, 1973, selling price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973. If no transaction occurred on May 15, 1973, the most recent day preceding May 15, 1973, when a transaction occurred shall be used for purposes of applying the price rule. If

the seller first offered an item for sale after May 15, 1973, and prior to the effective date of this subparagraph, the first day when the item was offered for sale shall be used for purposes of applying the price rule.

(d) *Certification.*—Each seller with respect to each sale of gasoline other than a retail sale must certify in writing to the purchaser the octane number of the gasoline sold.

Par. 8. Section 150.361 is amended by adding a new paragraph (b) (3) to read as follows:

§ 150.36 *New item and lease rule.*

* * * * *

(b) *Base price determination.*

* * * * *

(3) *Resellers.*—A reseller, reseller-retailer, retailer or refiner-reseller offering a new item, shall for purposes of applying the price rule § 150.359(c) determine the May 15 selling price for that item as the price at which that item is priced in transaction at the nearest comparable outlet on the day when the item is first offered for sale. For purposes of computing the “increased costs,” the cost of the item first offered for sale shall be used rather than the May 15, 1973 cost.

Par. 9. Section 150.362 is revised to read as follows:

§ 150.362 *Price information and posting.*

(a) Each seller of covered products shall maintain records of its base prices, base production control levels, and ceiling prices and shall make available upon request by a customer, the base price, base production control levels or ceiling price of any item being offered for sale to that customer.

(b) No later than 11:59 p.m., local time, November 7, 1973, each retail seller of gasoline and No. 2-D diesel fuel shall post the maximum permissible price allowed to be charged pursuant to § 150.355(b) or § 150.359(c) in a prominent place on each pump used to dispense gasoline or No. 2-D diesel fuel in retail sales and the octane number of that gasoline. Whenever an adjustment is made to the maximum permissible price each retail seller must adjust his posted price. Posting must be in the form and manner prescribed by the Cost of Living Council.

Par. 10. Section 150.363 is amended by adding a new paragraph (a) (3) to read as follows:

§ 150.363 *Reports and recordkeeping.*

(a) *Reports.*

* * * * *

(3) *No. 2 heating oil sellers.*—Any retail seller of No. 2 heating oil which increases the price of No. 2 heating oil pursuant to § 150.355(b) or § 150.359(c) must submit a report in accordance with the forms and instructions issued by the Cost of Living Council by the fifth day following the date on which the price is increased.

[FR Doc. 73-22275 Filed 10-15-73 ; 4:52 pm]

[From the Federal Register, Oct. 26, 1973]

TITLE 6—ECONOMIC STABILIZATION

CHAPTER I—COST OF LIVING COUNCIL

[Phase IV Price Ruling 1973-1]

PHASE IV PRICE RULINGS

Subpart L and Loss-Low Profit Rules

Facts. Company A is a firm consisting of the parent and four consolidated entities, engaged in certain manufacturing and wholesaling activities. Company A fully qualifies under § 150.201 to use the loss and low profit rules. However, the activities of the firm include the sale of petroleum products covered by the price rules of Subpart L of Part 150 and § 150.351(b) states that Subpart L supersedes the provisions of § 150.201 “with respect to sales and leases subject to this subpart.”

Issue. Does the sale of covered petroleum products by Company A preclude the firm from utilizing the pricing provisions of the loss and low profit rule with regard to its activities which are not subject to Subpart L?

Ruling. No. Subpart L only supersedes the application of the loss and low profit rules "with respect to sales and leases subject to this subpart." This language is intended to insure that the prices charged for petroleum products are solely regulated by Subpart L and may not be adjusted to compensate for low profit margins. The language does not, however, prevent the application of the loss and low profit rules to a firm's other activities. A firm must still qualify for use of the loss and low profit rules on the basis of all of its activities, including sales of covered petroleum products. If it qualifies, the firm may then use the loss and low profit rules in determining the prices it may charge except for prices of covered petroleum products. The firm's activities with respect to covered petroleum products remain subject to the rules of Subpart L.

WILLIAM N. WALKER,
General Counsel,
Cost of Living Council.

OCTOBER 24, 1973.

[FR Doc. 73-22985 Filed 10-25-73 ; 10:48 am]

PART 152—COST OF LIVING COUNCIL PHASE IV REGULATIONS

Extension of Interim Rules Applicable to the Food Industry and Miscellaneous Changes

Part 152 is amended in Subpart H to extend the interim rules for reporting pay adjustments in the food industry and to make various technical and clarifying changes in the special rules applicable to the food industry.

Section 152.71 is amended to make clear that the small business exemption in § 152.41 is applicable to pay adjustments affecting employees in the food industry.

Section 152.72 is amended in paragraph (c) to include employees of mobile lunch wagons as described in Standard Industrial Classification Code 5963 among those employees not subject to the provisions of this subpart.

Section 152.74 is amended in paragraph (e) to eliminate the requirement of six-month prenotification with regard to nonbudgeted pay adjustments and to require further prenotification in the event that actual pay adjustments will exceed those pay adjustments initially prenotified.

Section 152.73 is amended in paragraph (a) and § 152.75 is amended in paragraphs (a), (b), and (c) to extend the interim rules through January 31, 1974.

On July 19, 1973, the Council extended the interim rules for reporting pay adjustments affecting employees in the food industry until November 1, 1973. In August and September of 1973, meetings were held by the Council in various cities throughout the country with representatives of the food industry, at which questions were raised concerning the prenotification requirements. In view of the concerns expressed in such meetings, the Council has determined that the objectives and goals of the Economic Stabilization Program can better be served by extending the period during which the interim rules shall be followed to January 31, 1974, and by delaying the general operation of the prenotification rules until February 1, 1974. Thus, for example, the operation of the prenotification rule in § 152.73(b) will be delayed in taking effect from November 1, 1973, until February 1, 1974, even with respect to prenotifications already received by the Council for pay adjustments scheduled to be put into effect between those dates. Such pay adjustments are therefore subject to the rules of § 152.75 exclusively. Any prenotification of such a pay adjustment already filed will be treated as a report to the extent appropriate under the interim rules in § 152.75, and the pay adjustments so reported need not be reported again. However, no pay adjustment (except those described in § 152.75(a)) may be implemented in excess of the general wage and salary standard unless specifically approved by the Council.

Because the immediate implementation of Executive Order No. 11730 is required, and because the purpose of these regulations is to provide immediate guidance as to Cost of Living Council decisions, the Council finds that publication in accordance with normal rule making procedures is impracticable and that good cause exists for making these amendments effective in less than 30 days.

Interested persons may submit comments regarding these amendments. Communications should be addressed to the Office of the General Counsel, Cost of Living Council, Washington, D.C. 20508.

(Economic Stabilization Act of 1970, as amended, Public Law 92-210, 85 Stat. 743; Public Law 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 14, 38 FR 1489.)

JAMES W. McLANE,
Deputy Director,
Cost of Living Council.

PARAGRAPH 1. Part 152 of Title 6 of the Code of Federal Regulations is amended by revising § 152.71 to read as follows:

§ 152.71 *Scope.*

This subpart establishes special mandatory rules applicable to pay adjustments affecting employees in the food industry. This subpart does not apply to the pay adjustments of any manufacturer, service organization, wholesaler or retailer which both derives less than 20 percent of its annual sales or revenues from sales of food and less than \$50 million of annual sales or revenues from sales of food. The small business exemption set forth in Subpart E of this part is applicable to pay adjustments affecting employees in the food industry, with respect to work performed on and after September 12, 1973.

PAR. 2. Section 152.72 is amended by revising the introductory material in paragraph (c) to read as follows:

§ 152.72 *Pay adjustments affecting employees in the food industry.*

* * * * *

(c) On and after June 25, 1973, for purposes of paragraph (b) of this section, "Pay adjustments affecting employees in the food industry" does not include pay adjustments with respect to employees engaged on a regular and continuing basis in the operation of an eating place (described in Standard Industrial Classification Code 5812) or drinking place (described in Standard Industrial Classification Code 5813) or mobile lunch wagons (described in Standard Industrial Classification Code 5963) or in the rendering of administrative or support functions with respect to such operation, unless—

* * * * *

§ 152.73 *[Amended]*

PAR. 3. Section 152.73 is amended by deleting the date "November 1, 1973" in the introductory material in paragraph (b) (1) and by inserting in its place the date "February 1, 1974".

PAR. 4. Section 152.74 is amended by revising paragraph (e) to read as follows:

§ 152.74 *Procedures for prenotification and reporting.*

* * * * *

(e) *Individual increases.*—For purposes of §§ 152.73 and 152.75 prenotification of proposed pay adjustments affecting employees in the food industry shall be submitted to the Council in the manner set forth in this paragraph if such pay adjustments apply to individual employees within an appropriate employee unit during a control year, e.g., through operation of a merit plan which provides individual increases on a random or variable timing basis:

(1) *Prenotification for budgeted and nonbudgeted pay adjustments.*—If the pay adjustments for a control year are budgeted in advance of such control year, prenotification shall be submitted to the Council not less than 60 days prior to the first day of such control year, or as soon thereafter as the amount and timing of such proposed pay adjustments have been determined. If such pay adjustments are not budgeted in advance of a control year, prenotification shall be submitted to the Council not less than 60 days prior to the first day of such control year, or as soon thereafter as reasonable and supportable estimates of the amount and timing of pay adjustments anticipated or planned for during such control year can be provided. Such prenotification shall include such estimates and the grounds therefor.

(2) *Further prenotification.*—If an initial prenotification has been made and the amount of pay adjustments will be greater than that prenotified, further prenotification shall be submitted to the Council not later than 60 days prior to

the pay adjustment which will cause the percentage amount for the entire employee unit involved to exceed the percentage amount initially prenotified.

(3) *Limitation on pay adjustments.*—The total of wage and salary increases put into effect during a control year in a unit for which prenotification has been submitted under the provisions of this paragraph shall at no time exceed the maximum permissible annual aggregate wage and salary increase which has been approved by the Council following such prenotification, or which has been permitted to be put into effect pursuant to the provisions of § 152.73(b).

* * * * *

PAR. 5. Section 152.75 is revised to read as follows:

§ 152.75 *Interim rules for the period ending January 31, 1974.*

(a) *Contracts and pay practices in existence prior to November 14, 1971.*—Notwithstanding the provisions of § 152.73, a pay adjustment scheduled to be put into effect after 9 p.m., e.s.t., March 29, 1973, and prior to February 1, 1974, under the terms of a contract or pay practice previously set forth which existed prior to November 14, 1971, may be put into effect according to the terms of such contract or pay practice (provided that in the case of a pay practice such pay adjustment is put into effect with respect to a control year beginning prior to November 14, 1972). However, a report of such pay adjustment shall be submitted to the Council not later than 10 days after such pay adjustment is put into effect. Pay adjustments put into effect pursuant to the provisions of this paragraph are subject to challenge by any party at interest or by the Council. A challenge by a party at interest shall be submitted to the Council. In the contract or pay practice shall be allowed to remain in effect unless and until the Council rules otherwise. The Council will review a challenged pay adjustment to determine whether any wage or salary increase is unreasonably inconsistent with the standards and goals of the economic stabilization program. Following such review, the Council may approve such pay adjustment, prescribe specific wages or salaries, or impose any other requirements which are reasonable and appropriate to accomplish the purpose of the economic stabilization program.

(b) *Contracts and pay practices in existence after November 13, 1971, and prior to 9 p.m., e.s.t., March 29, 1973.*—Notwithstanding the provisions of § 152.73, a pay adjustment scheduled to be put into effect prior to February 1, 1974, under the terms of a contract entered into or a pay practice established prior to 9 p.m., e.s.t., March 29, 1973, which is not within the provisions of paragraph (a) of this section, may be put into effect without prenotification, to the extent that the total of all pay adjustments for the control year with respect to the appropriate employee unit does not exceed the general wage and salary standard (or applicable exception thereto for which prior approval was not required under the rules and regulations of the Pay Board in effect on January 10, 1973). A report of a pay adjustment put into effect pursuant to the provisions of this paragraph shall be submitted to the Council not later than 10 days after such pay adjustment has been put into effect. Such report shall include pay adjustments actually made and any pay adjustments for which approval of the Council is required. A pay adjustment put into effect pursuant to the provisions of this paragraph remains subject to review by the Council, which may by order prescribe specific wages or salaries.

COST OF LIVING COUNCIL

FOOD INDUSTRY WAGE AND SALARY COMMITTEE

NOTICE OF CLOSED MEETING

Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770) notice is hereby given that the Food Industry Wage and Salary Committee, established under the authority of section 212(f) (iv) of Executive Order 11695, and Cost of Living Council Order No. 14, will meet at 10 a.m., Thursday, November 1, 1973, at 2025 M Street NW., Washington, D.C.

The agenda will consist of discussions leading to recommendations on specific Phase II and Phase III wage cases in the food area, and future wage policy.

Since the above stated meeting will consist of discussions of future food wage

policy and Phase II and III cases for decision, pursuant to authority granted me by Cost of Living Council Order 25, I have determined that the meeting would fall within exemption (5) of 5 U.S.C. 552(b) and that it is essential to close the meeting to protect the free exchange of internal views and to avoid interference with the operation of the Committee.

Issued in Washington, D.C., on October 24, 1973.

HENRY H. PERRITT, Jr.,
Executive Secretary,
Cost of Living Council.

[FR Doc. 73-22937 Filed 10-24-73; 3:25 pm]

COST OF LIVING COUNCIL

[6 CFR Part 150]

PHASE IV PRICE REGULATIONS

STATE AND LOCAL GOVERNMENT SALES OF PETROLEUM PRODUCTS

Notice is hereby given that, pursuant to the authority of Executive Orders 11695 and 11730, the Cost of Living Council, as part of its continuing review of the operation of price controls with respect to the petroleum industry, is considering the adoption of certain amendments to exclude sales of "covered products" as defined in Subpart L from the exemption of price adjustments by State and local governments. If ultimately adopted, this regulation would be effective as of 9 a.m., e.s.t. October 25, 1973, the date upon which this notice of proposed rulemaking is filed with the FEDERAL REGISTER. It would occur to any delivery of covered products occurring after that date.

The Council is aware that certain government units as lessors of crude petroleum fields have the option to take royalty payment in kind. Under the existing regulations sales of products including crude petroleum and refined petroleum products by State and local governments are exempt from the Subpart L price rules for covered products. Under the proposed rule, the sale of crude petroleum or refined petroleum by State and local governments would be treated in the same manner as a sale by any other firm and would be subject to the provisions of Subpart L.

In undertaking this rulemaking procedure, the Council wishes to solicit comments on the impact of such a rule both with respect to supply and price stabilization. The Council is particularly interested in receiving comments on the proposed rule that focus upon the issues discussed in this notice.

Comments on the magnitude of the impact of the proposed rule in relation to total domestic sales of crude petroleum are of particular interest. Legislation currently pending in Congress proposes to exempt from all price controls the production of crude petroleum from stripper wells. The amount of production which would be affected by such an exemption is substantial, and the removal of the exemption from government sales should be viewed in this light.

Presently, there is a mandatory allocation program for propane and a mandatory allocation program for middle distillates scheduled to take effect on November 1. In addition, there is legislation pending which would impose mandatory controls on the allocation of crude petroleum. The Council is interested in the impact of sales of crude petroleum by states upon the regulatory scheme of any mandatory allocation program.

The effects of possible changes in traditional supply patterns which could result from sales of crude petroleum by states as well as the availability of alternate sources of supply both for the lessee refiners and those purchasing from the states are also matter on which the Council invites comments.

The Council is concerned about the possible impact of the proposed rule in light of the increasingly tight supply situation caused by the recent actions of certain mid-east governments with respect to the curtailment of sales of crude petroleum to the United States. These actions complicate the domestic crude petroleum supply situation, and may directly affect prices for crude petroleum and refined products.

Interested persons are invited to participate in the rulemaking by submitting written data, views or arguments with respect to the proposed regulations set forth in this notice to the Executive Secretariat, Cost of Living Council, 2000 M Street NW., Washington, D.C. 20508.

Comments should be identified on the outside envelope and on the document submitted with the designation "Proposed Phase IV Petroleum Amendments." Ten copies should be submitted. All comments received by November 24, 1973, will be considered by the Council before final action is taken on the proposed regulation. The proposed regulation may be changed in light of the comments received. All comments received in response to this notice will be available for examination and copying by interested persons at the Cost of Living Council, 2000 M Street NW., Washington, D.C. 20508, during the hours of 9 a.m. to 5 p.m., Monday through Friday. Submission may be inspected both before and after the ending date for comment.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, Stat. 27; E.O. 11695, 38 FR 1473; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 14, 38 FR 1489.)

In consideration of the foregoing it is proposed to amend Part 150 of Title 6 of the Code of Federal Regulations as set forth below.

Issued in Washington, D.C., 9 a.m., e.s.t., October 25, 1973.

JOHN T. DUNLOP,
Director,
Cost of Living Council.

PARAGRAPH 1. The exemption of certain price adjustments by State and local governments is amended to exclude sales of "covered products" as defined in Subpart L.

§ 150.54 *Certain price adjustments.*

(a) *Federal and State and local governments.* * * *

(2) Prices and fees charged by State and local governments for any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, facilities, materials, or similiar thing of value or utility, performed, furnished, provided, granted, prepared, issued, or transferred including tuition and other charges for schools, colleges, and universities owned or operated by a State and local government, are exempt, except, however, that prices charged for sales of "covered products" as defined in Subpart L, and fees or charges for health services (but not health service fees levied on all students as a condition of enrollment) are not exempt under the provisions of this section.

* * * * *

(f) *Government property.* * * *

(2) Prices charged for property sold by the United States or State and local governments, including lease-sales are exempt, except however, that prices charged by state and local governments for sales of "covered products" as defined in Subpart L are not exempt under the provisions of this section.

[FR Doc. 73-22984 Filed 10-25-73; 10:47 am]

[From the Federal Register, Nov. 7, 1973]

COST OF LIVING COUNCIL

[6 CFR Part 150]

HEALTH CARE

NOTICE OF PROPOSED RULEMAKING

Pursuant to Executive Order No. 11730, the Cost of Living Council is considering the adoption of the regulations set forth in this notice effective January 1, 1974.

On July 19, 1973 the Council removed institutional and noninstitutional providers of health services from the Council's freeze regulations, and continued the Phase II and Phase III mandatory controls applicable to these providers. It was indicated at that time that the continuation of these controls was intended to be an interim measure, and that new regulations governing providers of health services would be developed and issued as a separate subpart of the Phase IV regulations after extensive consultation with the Health Industry Advisory Committee of the Cost of Living Council and other interested health care providers and consumers.

On August 9, 1973, the Council amended Part 150 of the Cost of Living Council regulations to add Subpart O—Providers of Health Services. Subpart O continued the Phase II and Phase III rules applicable to institutional and non-institutional providers of health services, and merely removed the price rules from Part 130 to Part 150 without substantive change.

Since July 1973, numerous meetings and discussions have been held by the Health Industry Advisory Committee, subgroups of the Committee met frequently with members of the Cost of Living Council staff for the purpose of formulating proposals for discussion by the full committee, and comments and recommendations were solicited from other health care providers and consumers. The proposed rules have been developed through this consultative process.

Many critics asserted that Phase II rules were unfair and inequitable in that they tended to place all economic sectors under the same set of rules, thereby ignoring legitimate differences among them. Thus health care providers were lumped indistinguishably into two groups: The institutional and the noninstitutional providers. Phase IV is premised on the recognition of those differences and takes a sectoral approach to economic stabilization. This approach is apparent in the proposed treatment of the various institutions and professionals in the health care industry. This publication of the first sections of the rules includes separate sections for medical practitioners; acute care hospitals; long term care institutions; and Health Maintenance Organizations (HMO's) and HMO providers of health care. Very shortly, the Council will be issuing for comment proposed forms to be used by the various health care providers for purposes of monitoring and compliance.

Rules regarding coverage and exemption of other categories of health care providers not presently covered under these rules will be published separately for comment in the near future. It is contemplated that those providing products and services to providers of health care, such as dental laboratories, will not be covered by the rules governing providers of health services under Subpart O but will be included under Subpart E of this Part relating to Manufacturing and Service Activities. It is also expected that not all classes of health care providers presently covered under the Phase II and Phase III rules will be included under the final Phase IV rules governing health care providers.

In issuing this notice of proposed rulemaking, the Council is inviting public comment on the price control rules contemplated for Phase IV which are contained herein. Interested persons are invited to participate in the rulemaking by submitting written data, views, or arguments with respect to the proposed regulations set forth in this notice, to the Executive Secretariat, Cost of Living Council, 2000 M Street NW., Washington, D.C. 20508. Comments should be identified with the designation "Proposed Phase IV Health Care Docket" and should be organized so that those dealing with a particular type of health care provider are separate from those dealing with other types (i.e., on separate pages). At least 10 copies should be submitted. All communications received before December 1, 1973, will be considered by the Council before taking final action on the proposed regulations. The proposed regulations contained in this notice may be changed in the light of comments received. All comments received in response to this notice will be available for examination and copying by interested persons at the Cost of Living Council, 2000 M Street NW., Washington, D.C., during the hours of 9:00 a.m. to 5:00 p.m., Monday through Friday. Submissions will be available both before and after the closing date for comments.

§ 150.501–§ 150.504 GENERAL

Section 150.501 specifies the scope of Subpart O and the applicability of its provisions. It provides that these rules apply to medical practitioners effective January 1, 1974; to acute care hospitals, long term care institutions, and Health Maintenance Organizations (HMO's) beginning with their first fiscal year commencing on or after January 1, 1974; and to HMO providers of health care beginning with the effective date of these rules for such providers. This section also specifies certain special cases when a health care provider is subject to the rules applicable to another type of health care provider.

Section 150.502 provides that for health care providers covered under Subpart O whose current fiscal years will end during calendar year 1974, the rules currently set forth in 6 CFR 300.18 and 300.19 will remain applicable until the completion of the current fiscal year.

Section 150.503 contains the definitions specifically applicable to providers of health care services.

Section 150.504 provides that all prospective rulings issued under the Economic Stabilization Act prior to January 1, 1974, to providers of health care services covered under Subpart O remain in effect.

Sections 150.508 through 150.513 *Medical Practitioners*. These rules retain the basic framework of Phase II and Phase III price controls on medical practitioners, but contain the following major changes:

The allowable annual aggregate weighted price increase is raised from 2.5 percent to 4 percent (§ 150.508(a)(1)).

Price increases for individual services over \$10.00 are limited to 10 percent annually, and under \$10.00 to a \$1.00 annual price increase (§ 150.508(a)(2)).

Price increases for independent practitioners providing health care services under fixed dollar amount contracts are limited to 6.2 percent annually (derived from the general wage guidelines of 5.5 percent for wages and .7 percent for fringe benefits) (§ 150.508(b)).

Aggregate weighted price increases are determined using weights based on the previous calendar year's billings rather than projected volume of services, and a formula for precise calculation is provided (§ 150.508(d)).

Cost justification is no longer required for price increases.

A limit has been placed on the length of time the profit margin test (called revenue margin in these rules) is in effect. When a price has been increased during the first fiscal quarter over the price lawfully in effect on the last day of the preceding fiscal year, the revenue margin test applies only during that fiscal year. If the price is increased after the first fiscal quarter, then the test applies during both that and the succeeding fiscal year (§ 150.509).

A section has been included to specify the rules for pricing when a group practice has been formed (§ 150.511).

A requirement for posting a sign stating the availability and location of a price schedule is set forth (§ 150.512).

Specific factors have been set forth which the Cost of Living Council will consider in reviewing requests for exception to these rules (§ 150.513).

Sections 150.516 through 150.525 *Acute Care Hospitals*. The basic price control limitation on hospitals of aggregate annual revenues in Phase II and Phase III has been replaced in Phase IV by a limitation for inpatient care on charge and expense increases per admission. In order to encourage the substitution of less expensive ambulatory care for inpatient care where possible, and to recognize the nature of changes in service intensity in the outpatient areas, separate limitations are provided for outpatient care. The previous system focused on the average daily rate reimbursed to the hospital by reimbursers and to the extent they could be measured, on the revenues from changes in the prices of individual services. From the point of view of the patient and third party payors who claimed to have little influence on the number or nature of the items which accumulated on each bill, the restraints on costs were asserted to be unclear and of limited effectiveness. By contrast, the incentive to control costs and to reduce the length of stay for the patient is built into the Phase IV system, which focuses on the average charge and average cost of a complete stay in a hospital. As a result, there is no requirement for cost justification of price increases under these rules, and the profit and revenue margin tests under Phase II and Phase III have also been eliminated. This should allow hospitals greater flexibility in responding to local cost pressures and also provide an incentive to improved efficiency. It is expected that hospitals and third party payors will assume a major responsibility to ensure that the intent of these rules are followed and that unnecessary admissions will not take place.

The main features of the rules relating to acute care hospitals are as follows:

The basic limitation on a hospital's increases in inpatient charges and expenses per admission in any fiscal year is 7.5 percent (§ 150.516). When there are significant changes in volume, adjustments are provided for to reflect the fixed/variable cost relationships of hospitals (§ 150.517). The factor of 43 percent used to calculate the required volume adjustment is derived by multiplying the basic limitation of 107.5 by 40 percent, which is an assumed variable cost factor in hospital operating expenses. That is, the costs of admitting each additional patient should be no more than 40 percent. The basic 7.5 percent allowable increase limitation applied to this factor increases it to 43 percent. Special provisions regarding the volume adjustment are included for small hospitals (§ 150.517(d)), hospitals with a significant increase in bed complement (§ 150.517(e)), and new facilities (§ 150.517(f)).

The basic limitation on a hospital's increases in prices or reimbursable costs for outpatient services is 6 percent (§ 150.518). Hospitals have an option of control-

ling prices for outpatient services on the basis of either a unit price system or an aggregate weighted price system; if the aggregate weighted price system is chosen, the price increase for any individual service is limited to 10 percent annually.

When the special pricing rules for new facilities and new markets are used, hospitals are required to submit justification for such pricing to the Cost of Living Council at the end of the fiscal year (§ 150.520).

The requirement of posting a sign stating the availability and location of a price schedule has been reinstituted (§ 150.521).

Specific factors have been set forth which the Cost of Living Council will consider in reviewing requests for exception to these rules, and an increased role for state planning agencies in the exception process for capital expenditures has been provided (§ 150.523).

Each state and the District of Columbia are requested to designate an agency to advise the Council on such matters as exception requests (§ 150.524).

Provision is made for a state which has a health care price control program with rules which have substantially the same effect on health care charges and costs as the controls set forth in these rules, to receive a certificate of compliance from the Cost of Living Council to administer its control program in lieu of the Council's (§ 150.525). These provisions are similar to the provisions formerly in effect for public utilities under Part 300 of Title 6 of the Code of Federal Regulations.

Sections 150.528 through 150.534 Long Term Care Institutions. These rules differentiate between hospitals and long term care institutions in order that the unique features of each may be recognized. The basic control on long term care institutions is average realized revenues per day by class of purchaser (Medicare, Medicaid, and all other) and level of care. Since each class of purchaser is limited separately, no one class can be required to pay a disproportionate share of an institution's total costs. In addition, the control by class of purchaser simplifies compliance by the provider, and allows Medicaid, Medicare, and the charge paying consumer to participate more effectively in the monitoring of the control program. The proposed system is designed to accommodate the upward movement of Medicaid reimbursement rates on a state by state basis by providing for a state-wide exception process for increases in these rates above the allowable limit.

The main features of the rules relating to long term care institutions are as follows:

The basic limitation on an institution's average realized revenues per diem in any fiscal year is 6.5 percent (§ 150.528). Rules for the application of this limitation are specified in § 150.529.

Provision is made to enable a State agency which desires to raise its general level of Medicaid reimbursement by more than 6.5 percent for any level of care, to obtain an exception to these limitations for each long term care institution within the State. The information which must be demonstrated and certified to the Council under this state-wide exception process is specified in § 150.530.

The special pricing rules for long term care institutions include pricing for a new level of care and include new criteria for making new facility and new market determinations (§ 150.531). The justification required of long term care institutions for such pricing is similar to that required for acute care hospitals.

The price schedule posting requirements for long term care institutions apply only to services provided to private pay patients (§ 150.532).

The provisions relating to exceptions, advisory state actions, and state control programs are the same for long term care institutions as for acute care hospitals (§ 150.534).

Sections 150.536 through 150.545 Health Maintenance Organizations and Health Maintenance Organization Providers of Health Care. These sections set forth the rules applicable to rate increases by Health Maintenance Organizations (HMO's) and prices charged by HMO providers of health care. Under the regulations in effect during Phase II, an HMO was governed by two different sets of regulations 6 CFR 300.18 and 6 CFR 300.20. For purposes of adjusting its prices either with a contracting hospital or with its own medical unit, an HMO was considered an institutional provider of health care and therefore regulated by § 300.18. For purposes of adjusting its rates to HMO subscriber members, an HMO was considered an insurer and therefore regulated by § 300.20.

Due to the difficulty in applying two separate and distinct regulations to the integrated system of the HMO as an insurer and provider of health services, these Phase IV sections set forth a set of controls that has been molded to the style of operations unique to the HMO.

Section 150.536 prescribes limitations on factors in the ratemaking formula such as administrative expenses, claim frequency, actual costs, and anticipated costs for determining rate increases by an HMO.

Section 150.536(a) (5) establishes specific criteria for that portion of the factor in the ratemaking formula which represents the major costs of providing various types of health care by an HMO.

In order to encourage the successful operations of newly formed HMO's, new HMO's, defined as those in operation for less than four years and having less than 35,000 subscriber members, are not subject to the limitations specified in § 150.536.

An HMO having more than 60,000 HMO members is required by Section 150.538 to prenotify those proposed rate increases in excess of 5 percent which effects \$500,000 or more of its annual revenues under that existing rate.

In addition, all HMO's will be required to submit annual reports no later than 120 days following the end of each of their fiscal years (§ 150.544).

Sections 150.537, covering changes in ratemaking formula; 150.539, relating to State certification; 150.540, relating to self-certification; 150.541, covering Federal Employees Health Benefits; 150.542, covering Council actions following notice of certification or prenotification; and 150.543 covering HMO rates subject to State laws, have been provided because the correlated requirements for insurers under Subpart M of this Title are equally relevant to Health Maintenance Organizations.

Due to the limitations set forth in § 150.536 on the factors used in the ratemaking formula of an HMO, no profit margin limitation has been established for HMO's at this time.

Section 150.545 sets forth the rules applicable to an HMO provider of health care, which has been defined as an acute care hospital, long term care institution, or medical practitioner who derives at least 75 percent of his annual revenues from health care services rendered to HMO subscriber members. These HMO providers of health care, by virtue of doing a majority of their business with HMOs, are excluded from the provisions of the sections relating to acute care hospitals, long terms care institutions, or medical practitioners. HMO providers of health care are not subject to a profit margin limitation but are limited in their prices or charges with respect to their provision of health care to HMO members.

Generally, HMO providers of health care that are acute care hospitals are subject to the same limitations on increased charges as acute care hospitals. HMO health care providers who are medical practitioners are subject to the same limitations as medical practitioners. These restrictions are detailed in § 150.545.

In consideration of the foregoing it is proposed to amend Title 6, Code of Federal Regulations as set forth below.

(Economic Stabilization Act of 1970, as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11723, 38 FR 15765; Cost of Living Council Order No. 30, 38 FR 16267.)

Issued in Washington, D.C., on November 5, 1973.

JOHN T. DUNLOP,
Director,
Cost of Living Council.

Amend Part 150 by revising Subpart O to read as follows:

PART 150—COST OF LIVING COUNCIL PHASE IV REGULATIONS

SUBPART O—HEALTH CARE

GENERAL

- | | |
|---------|--|
| Sec. | |
| 150.501 | Scope and applicability. |
| 150.502 | Continued applicability of existing regulations. |
| 150.503 | Definitions. |
| 150.504 | Prior commitments. |

MEDICAL PRACTITIONERS

- | | |
|---------|-----------------------------|
| 150.508 | Price increase limitations. |
| 150.509 | Revenue margin limitation. |
| 150.510 | New services or property. |
| 150.511 | Group formation. |
| 150.512 | Price schedules. |
| 150.513 | Exceptions. |

ACUTE CARE HOSPITALS

- | | |
|---------|---|
| 150.516 | Limitation on charge and expense increases per inpatient admission. |
| 150.517 | Volume adjustment for change in inpatient admissions. |
| 150.518 | Limitation in price or cost increases for outpatient services. |
| 150.519 | Cumulative increases. |
| 150.520 | Special pricing rules. |

- 150.521 Price schedules.
- 150.522 Reporting procedures.
- 150.523 Exceptions.
- 150.524 Advisory state actions.
- 150.525 State control program.

LONG TERM CARE INSTITUTIONS

- 150.528 Limitations on average realized revenues per diem.
- 150.529 Application of limitations.
- 150.530 Medicaid reimbursement rates.
- 150.531 Special pricing rules.
- 150.532 Price schedules.
- 150.533 Reporting procedures.
- 150.534 Exceptions ; advisory state actions ; state control program.

HEALTH MAINTENANCE ORGANIZATIONS AND HEALTH MAINTENANCE ORGANIZATION PROVIDERS OF HEALTH CARE

- 150.536 Criteria for rate increases.
- 150.537 Change in ratemaking formula.
- 150.538 Premotification.
- 150.539 Certification by state regulatory agency.
- 150.540 Self-certification.
- 150.541 Federal Employees Health Benefits Law.
- 150.542 Cost of Living Council actions.
- 150.543 HMO rates subject to State laws.
- 150.544 Reporting.
- 150.545 HMO providers of health care.

GENERAL

§ 150.501 *Scope and applicability.*

(a) Sections 150.508 through 150.513 apply to medical practitioners effective January 1, 1974. A medical practitioner who is under contract to one or more Health Maintenance Organizations and who derives at least 75 percent of his aggregate annual revenues from services rendered to Health Maintenance Organization members pursuant to contract, is subject to the rules and regulations applicable to Health Maintenance Organizations.

(b) Sections 150.516 through 150.525 apply to each acute care hospital beginning with its first fiscal year commencing on or after January 1, 1974.

(1) Long term care, home health services, community health services, and similar patient services when operated by or for an acute hospital, are subject to the rules and regulations applicable to such services under this subpart.

(2) An acute care hospital which is owned or operated by or under contract to a Health Maintenance Organization and which derives at least 75 percent of its gross inpatient operating revenues from services rendered to enrolled participants, is subject to the rules and regulations applicable to Health Maintenance Organizations.

(c) Sections 150.528 through 150.534 apply to each long term care institution beginning with its first fiscal year commencing on or after January 1, 1974. A long term care institution which is owned or operated by or under contract to a Health Maintenance Organization and which derives at least 75 percent of its gross inpatient operating revenues from services rendered to enrolled participants, is subject to the rules and regulations applicable to Health Maintenance Organizations.

(d) Sections 150.536 through 150.545 apply to each Health Maintenance Organization (HMO) beginning with its first fiscal year commencing on or after January 1, 1974, and to each HMO provider of health care beginning with the effective date of these rules for such providers.

§ 150.502 *Continued applicability of existing regulations.*

For a health care provider covered under this subpart whose current fiscal year will end during calendar year 1974, the rules and regulations in effect on December 31, 1973 remain in effect until the completion of the current fiscal year.

§ 150.503 *Definitions.*

"Acute care hospital" means any hospital that meets the requirements of the American Hospital Association for registration as a short term care general or special hospital.

"Admissions" means the number of patients accepted for inpatient service in beds licensed for hospital care. For the purposes of this definition, infants born in a hospital shall not be included within the number of patients by the fact of birth alone.

"Aggregate annual revenues" means the total revenues for the fiscal year concerned derived from the provision of all medical services and properties, including—

- (1) Revenues from daily patient services (surgery, laboratory and X-ray, office visits, home and hospital calls, and similar services) ;
- (2) Revenues from the sale of medicines and drugs ; and
- (3) Revenues from other services, sales, and activities directly related to the provision of health care.

"Average realized revenues" means the realized revenues for each long-term-care institution's class of purchasers for each level of care divided by the number of patient days of care provided for the same level of care for the same class of purchasers.

"Base period revenue margin" means the ratio that the base period net revenues (aggregate annual revenues less total operating expenses directly related to the provision of health care) bears to the base period aggregate annual revenues, computed in accordance with the medical practitioner's customary accounting practices consistently applied. For the purpose of this definition, revenues and operating expenses derived from the provision of health care under a contract with a Health Maintenance Organization (HMO) are not included in the computation of base period revenue margin.

"Health maintenance organization" (HMO) means a private or public organization which provides, either directly or indirectly through arrangements with others, a reasonably comprehensive provision of health care to health maintenance organization members on a per capita pre-payment basis, and in which one or more of the health maintenance organization providers of health care shares in the financial risk. If an HMO operates in more than one geographical region, then for the purposes of this definition, the organization may elect to treat each region as a separate HMO.

"HMO member" means a person entitled to the provision of health care by virtue of a prepaid contract or for stipulated consideration with an HMO.

"HMO provider of health care" means :

- (1) An acute-care hospital which is owned or operated by or under contract to an HMO and which derives at least 75 percent of its total inpatient operating charges from services rendered to HMO members ;
- (2) A medical practitioner who is under contract to an HMO and who derives at least 75 percent of his aggregate annual revenues from services rendered to HMO members ; or
- (3) A long term care institution which is owned or operated by or under contract to an HMO and which derives at least 75 percent of its realized revenues from services rendered to HMO members.

"HMO system" means two or more HMOs under common direct or indirect control.

"Levels of care" means the following :

- (1) For Medicare patients—skilled nursing care.
- (2) For Medicaid patients—those categorizations of care specified by each State Title XIX (42 USC 1395aa) agency for reimbursement purposes.
- (3) For all other patients—existing classifications of levels of care for patients, specifically identified in the accounting practices of the institution during the preceding fiscal year.

"Long term care institution" means any institution which is :

- (1) A licensed hospital or part thereof that does not meet the requirements of the American Hospital Association for registration as a short term care general or special hospital.
- (2) An institution or part of an institution that is certified for participation in Medicare as a skilled nursing facility ;
- (3) An institution or part of an institution that participates in Medicaid as a skilled nursing facility or intermediate care facility.
- (4) Other skilled nursing facilities, intermediate care facilities and other nursing homes licensed by a State to provide medical care.

For its purposes of this definition, if any housing for the elderly includes as part of its facility a distinct part licensed or certified for the provision of skilled nursing or intermediate care, only such distinct part is included in this definition. As used herein, "housing for the elderly" includes purely residential shelter, and personal and sheltered care institutions that provide health related services as part of a general program of supervision and personal care to residents not in need of substantial, continuous nursing services or medical care.

The availability of 24-hour nursing service does not preclude the inclusion of an institution in the definition of "housing for the elderly," unless the primary purpose of the institution, or of a distinct part of the institution, is to provide nursing care on a continuous basis.

"Long term care institution's class of purchasers" means the following three classes:

- (1) Medicare patients.
- (2) Medicaid patients.
- (3) All other patients.

"Medical practitioner's class of purchasers" means a category or a group of purchasers to which a medical practitioner has charged a comparable price for comparable service or property pursuant to a customary price differential among those groups or categories of purchasers.

"Medical practitioner" means physicians and surgeons, osteopathic physicians, dentists and dental surgeons, podiatrists, optometrists, chiropractors, and clinical psychologists. A medical practitioner may be an individual, partnership, association, firm, group, or corporation.

"New facility" means:

(1) An acute care hospital or a long term care institution which commenced operation for the first time, or which was not operated at any time during the one-year period immediately preceding a commencement of operation; or

(2) An acute care hospital or long term care institution which undergoes physical replacement; or major renovation, remodeling or expansion that costs a dollar amount equal to at least 70 percent of the book value of its capital assets or \$100,000, whichever is greater. For the purposes of this definition, the mere acquisition of a hospital or institution or of the person that controls the hospital or institution by another person does not constitute a new facility.

"New HMO" means an HMO that has been in operation less than four years and has less than 35,000 HMO members.

"New level of care" means the establishment of a new separate category of services recognized by accepted third party reimbursement agents. For purposes of this definition, the new category of services must entail distinct costs which are significantly different from the costs associated with the levels of care previously provided. The new level of care must furnish significantly different kinds or intensity of services from those already prevailing within the institutions.

"New market" means a change in location from the site where health care services were previously provided of greater than 50 miles or, with the prior approval of the Council, a change in location of 50 miles or less.

"New service or property" means a service or property which the hospital, institution or practitioner did not sell or lease in the same or substantially similar form at any time during the one-year period immediately preceding the first date on which it is offered for sale or lease. For the purposes of this definition, a change in appearance, arrangement, or combination, or a change in the method or technology of providing a service, does not create a new service or property.

"Prenotifier" means an HMO or an HMO system that had more than 60,000 HMO members during the calendar year preceding the effective date of a proposed rate increase.

"Price" means any charge for the sale or lease of any service or property, regardless of form. For the purposes of this definition, the "price" in a percentage of gross or net revenues contract is the percentage specified therein multiplied by the unit price of each service performed or product provided.

"Principal services or property" means those services or property which comprise 90 percent of a medical practitioner's aggregate annual revenues.

"Rate" means a unit charge which produces a premium amount to be charged or paid for the providing of health care through an HMO, calculated in accordance with a ratemaking practice or formula, or developed under a classification system.

"Rate increase" includes a restriction in coverage, an increase in a deductible level, or any similar reduction in benefits to HMO members without a corresponding reduction in rates.

"Realized revenues" means:

(1) For institutions on a cash basis of accounting, the total cash received for patient services; and

(2) For institutions on an accrual basis of accounting, the total charges accrued for patient services rendered during the same fiscal year.

"Revenue margin" means the ratio that net revenues (aggregate annual revenues less total operating expenses directly related to the provision of health care) bears to aggregate annual revenues for a fiscal year computed in accordance with the medical practitioner's customary accounting practices consistently applied. For the purpose of this definition, revenues and operating expenses derived from the provision of health care under a contract with an HMO are not included in the computation of revenue margin.

"State regulatory agency" means any commission, board, or other legal body that has jurisdiction over rates or practices of HMO's in a State or the District of Columbia.

"Total inpatient operating charges" means the sum of billed charges for all services performed on an inpatient basis in any fiscal year, computed by taking the sum of all inpatient service charges for the year concerned, including:

- (1) Charges for daily patient services (routine services);
- (2) Charges for other nursing services (operating room, central services and supplies, and similar services);
- (3) Charges for other professional services (ancillary-laboratory, radiology, anesthesiology, and similar services); and
- (4) All other inpatient service charges not covered above.

"Total inpatient operating expenses" means the sum of operating expenses, both direct and indirect, including interest and depreciation, allocated to inpatient services in accordance with Medicare accounting practice when the hospital has Medicare or Medicaid patients, or in accordance with generally accepted hospital accounting practices.

§ 159.504 *Prior commitments.*

Notwithstanding any other provision of these regulations, all prospective decisions, rulings, interpretations issued by the Council prior to January 1, 1974 to providers of health care services covered under this subpart remain in effect.

MEDICAL PRACTITIONERS

§ 159.508 *Price increase limitations.*

(a) Except as provided in paragraph (b) of this section with respect to prices charged under fixed dollar amount contracts and except for prices charged under a contract with a new HMO, a medical practitioner may not increase any of his prices in excess of the following limitations:

(1) The aggregate weighted price, computed on the preceding calendar year's billings, for all services and property may not be more than 104 percent of the aggregate weighted price for all services and property lawfully in effect on the last day of the preceding calendar year; and

(2) The price charged for any service or property may not be more than 110 percent of the price lawfully in effect for that service or property on the last day of the preceding calendar year (however this subparagraph does not require that price increases be limited to amounts less than \$1.00).

(b) The price specified in a fixed dollar amount contract including a maximum or minimum guarantee may not exceed 106.2 percent of the amount specified in the contract in the preceding contract year.

(c) Notwithstanding the limitation of paragraph (a)(1) of this section, any unused aggregate weighted price increase to which a medical practitioner is lawfully entitled (including those accruing prior to the effective date of this regulation) may be accumulated but not compounded.

(d) The formula for computing the percentage aggregate weighted price increase (%AWPI) is as follows:

$$\%AWPI = \sum \frac{P_1 - P_2}{P_1} \times \frac{B_1}{B_2} \times 100$$

where:

P_1 = the price lawfully in effect on the last day of the immediately preceding calendar year for a service or property.

P_2 = the highest price charged during the current calendar year for that service or property.

B_1 = the actual gross billings during the immediately preceding calendar year for that service or property.

B_2 = the total gross billings during the immediately preceding calendar year for all services or property.

= the sum of

(e) *Dentists—items using gold.* A dentist may increase the price of a dental item in which gold is used, without regard to paragraphs (a) (1) and (a) (2) of this section, to reflect the increase since January 1, 1974, in the cost of gold used in that item on a dollar-for-dollar basis, without rounding off. Any decrease in the cost of gold used in that item shall likewise be reflected, dollar-for-dollar in the price of that item.

§ 150.509 *Revenue margin limitation.*

(a) In addition to the limitations set forth in § 150.508, if a medical practitioner increases any price, except for a price charged under a contract with an HMO, over the price lawfully in effect on the last day of the preceding fiscal year, his revenue margin during—

(1) That fiscal year, if the price is increased during the first quarter, or

(2) That fiscal year and the succeeding fiscal year, if the price is increased subsequent to the first fiscal quarter—may not exceed his base period revenue margin.

(b) If a medical practitioner has incorporated during or subsequent to the base period, the medical practitioner shall determine his revenue margin and base period revenue margin under paragraph (a) of this section by excluding from operating expenses any salary or pension or other deferred compensation in excess of the amount permitted to be deferred under 26 U.S.C. 401 (the Keogh Plan) and paid to any individual medical practitioner employed by and who is an officer or owner of the corporation.

§ 150.510 *New services or property.*

The price for a new service or property or for a service or property being provided in a new market shall be determined as follows:

(a) To the maximum extent possible, the price of the service or property shall be the average price received in a substantial number of current transactions by other comparable medical practitioners providing comparable health care services and properties.

(b) If comparable health care services or property are not provided by other comparable medical practitioners, then the medical practitioner may use any other pricing practice commonly used by other comparable medical practitioners engaged in comparable medical practice.

§ 150.511 *Group formation.*

The price with respect to the furnishing of a service or property when one medical practitioner has joined or formed a group with another medical practitioner or practitioners shall be—

(a) The price in effect for each of the medical practitioners; or

(b) The highest price charged for the service or property by all medical practitioners in at least 40 percent of their transactions with the same class of purchasers during the proceeding calendar year.

§ 150.512 *Price schedules.*

Each medical practitioner shall maintain, even if no price increases are implemented, at each of its facilities a schedule showing his prices in effect on October 1, 1973 for each class of purchasers for his principal services or property, each subsequent change in the price of these services or property, the date the change of price was made, and the weights of these services or property used to determine the aggregate weighted price change. The schedule shall be made available for public inspection, and a copy shall be furnished to any person upon request. Each practitioner shall post a conspicuous and easily readable sign in each of his facilities stating the availability and location of the schedule. No price may be increased before the sign is posted and the schedule is made available for public inspection.

§ 150.513 *Exceptions.*

No medical practitioner may implement a price increase in excess of the limitations set forth in these sections unless the medical practitioner has requested and received an exception from the Cost of Living Council for the purpose of preventing or correcting a serious hardship or gross inequity. Subject to the general requirements relating to exceptions imposed by Part 155, the Council shall consider all relevant factors in reviewing an exception request, such as—

(a) The prices lawfully in effect prior to the effective date of this regulation or base period revenue margin are not substantially representative of the nature of the petitioner's current practice.

(b) In the absence of the factors in paragraph (a) of this section, there is a presumption that the petitioner's revenue margin must be declining before the following are to be considered as factors that may cause the petitioner a serious hardship or gross inequity—

- (1) Government mandated cost increases;
 - (2) Costs incurred with respect to wage increases for employees whose wages are substandard, as defined in § 152.32 of this Title, or below minimum wage rates imposed by Federal or State statutes of general application.
 - (3) Cost increases related to substantial and significant improvements in the quality of service or property already provided;
 - (4) Current operating revenues inadequate to meet current operating expenses;
 - (5) Significant change in amount of bad debts; and
 - (6) Effective cost containment initiatives undertaken by the medical practitioner.
- (c) In the case of a request for an exception to the revenue margin limitation, the Council will consider a demonstrable increase in the amount of medical care delivered (including as one measurement, the additional total hours worked).

ACUTE CARE HOSPITALS

§ 150.516 Limitation on charge and expense increases per inpatient admission.

Except as provided in § 150.517, an acute care hospital's total inpatient operating charges and total inpatient operating expenses per admission during any fiscal year may not be more than 107.5 percent of their respective levels during the preceding fiscal year.

§ 150.517 Volume adjustment for change in inpatient admissions.

(a) If during any fiscal year a hospital has more admissions than in its preceding fiscal year, for each admission exceeding 102 percent of the admissions during the preceding fiscal year, total inpatient operating charges and total inpatient operating expenses per admission may not exceed 43 percent of their fiscal year. However, this paragraph does not require that the overall increase in total inpatient operating charges and in total inpatient operating expenses per admission permitted by § 150.516, this paragraph, and § 150.519 be limited to less than 103 percent of their respective levels during the preceding fiscal year.

(b) If during any fiscal year a hospital's admissions are fewer than 100 percent but not less than 95 percent of its admissions during the preceding fiscal year, its total inpatient operating charges and its total inpatient operating expenses during that fiscal year may not be more than 107.5 percent of their respective levels during the preceding fiscal year.

(c) If during any fiscal year a hospital has fewer admissions than in its preceding fiscal year, for each admission below 95 percent of the admissions during the preceding fiscal year, an amount equal to the number of the admissions times 43 percent of the total inpatient operating charges per admission and 43 percent of the total inpatient operating expenses per admission during the preceding fiscal year, shall be deducted from the total inpatient operating charges and the total inpatient operating expenses, respectively, allowed under paragraph (b) of this section. However, this paragraph does not permit the overall increase in total inpatient operating charges and in total inpatient operating expenses per admission permitted by § 150.516, this paragraph, and § 150.519 to exceed 120 percent of their respective levels during the preceding fiscal year.

(d) In the case of a hospital which has either less than \$2,000,000 of total inpatient operating expenses or less than 3,500 admissions in its preceding fiscal year, the limitations on total inpatient operating charges and total inpatient operating expenses per admission contained in paragraphs (a) and (c) of this section shall not apply unless its admissions increase above 104 percent or fall below 90 percent of the admissions during the preceding fiscal year.

(e) In the case of a hospital that has an increase of 10 percent or more over the preceding fiscal year in its licensed bed complement, the limitations on total inpatient operating charges and total inpatient operating expenses per admission contained in paragraphs (a) and (c) of this section do not apply until after the first full fiscal year following the increase.

(f) In the case of a new facility, the limitations on total inpatient operating charges and total inpatient operating expenses per admission contained in paragraphs (a) and (c) of this section do not apply until after the first full 2 fiscal years of operation.

§150.518 Limitation on price or cost increases for outpatient services.

(a) (1) This section applies to—

(i) the prices charged in each revenue department and cost center, as determined by the hospital's customary practice, in which at least 70 percent of the total billed charges of that revenue department or cost center are attributable to the providing of outpatient services; and to

(ii) the price charged for each outpatient service for which there is a separately identified outpatient charge.

(2) Regardless of whether or not prices for outpatient services are required to be controlled under this section, all charges and costs attributable to the provision of inpatient services shall be included in the computations made under § 150.516 and § 150.517.

(b) An acute care hospital may elect to control its prices for outpatient services under this section on the basis of either a unit price system or an aggregate weighted average price system.

(1) If the hospital elects the unit price system, it may not charge a price for any outpatient service that is more than 106 percent rounded to the nearest quarter dollar of the price lawfully in effect for that service on the last day of the preceding fiscal year.

(2) If the hospital elects the aggregate weighted price system:

(i) The aggregate weighted price charged for all of its outpatient services may not be more than 106 percent of the aggregate weighted price for all such services lawfully in effect during the preceding fiscal year; and

(ii) The price charged for any outpatient service may not be more than 110 percent of the price lawfully in effect for that service on the last day of the preceding fiscal year (however this subparagraph does not require that price increases be limited to amounts less than \$1.00).

(c) Where by contract or legislation, outpatient services are reimbursed on a cost basis, cost increases per occasion of service, as defined in the contract or legislation, may not be more than 106 percent of the cost per occasion of service over the preceding fiscal year. Prospectively determined rates for outpatient services reimbursed on behalf of third party cost reimbursers are not to be subject to this paragraph.

§ 150.519 Cumulative increases.

In the application of § 150.516, § 150.517, and § 150.518, price or cost increases permitted in one year but not fully implemented may be accumulated, but not compounded, and can be used only in the next fiscal year following the year in which the full allowable increase was not taken.

§ 150.520 Special pricing rules.

(a) The prices for a new service or property for outpatient care, for a service or property provided by a new facility and for a service or property provided by an acute care hospital serving a new market shall be determined as follows:

(1) To the maximum extent possible, the price of the service or property shall be the average price received in a substantial number of current transactions by other comparable hospitals providing comparable health care services and properties. If there are no comparable hospitals with similar debt service and depreciation costs, the incremental amount of these costs may be reflected in the prices.

(2) If comparable health care services are not provided by comparable hospitals, then the hospital may use any other pricing practice commonly used by other hospitals, with the adjustment for debt service and depreciation costs permitted by paragraph (a) (1) of this section.

(b) Each hospital which prices a property or service provided by or in a new facility or new market, respectively, in accordance with paragraph (a) of this section shall submit justification for those prices to the Cost of Living Council on CLC Form at the end of the fiscal years in which the price was implemented.

§ 150.521 Price schedules.

Each acute care hospital shall maintain at each of its facilities a schedule showing its prices for all services on the last day of the preceding fiscal year, and each subsequent change in those prices and the date each change was made. The schedule shall be made available for public inspection, and a copy shall be furnished to the public, to third-party payors and to a representative of the Cost of Living Council upon request. Each hospital shall post an easily readable sign stating the availability and location of the schedule. The sign must be posted conspicuously in each location where a patient may be received for service and

where payment for services is accepted. No price may be increased before the sign is posted and the schedule is made available.

§ 150.522 Reporting procedures.

Each acute care hospital shall, within 120 days after the end of each fiscal year, submit a completed CLC Form to the Cost of Living Council, Office of Health, Compliance Division, 2000 M Street NW., Washington, D.C. 20508.

§ 150.523 Exceptions.

(a) No acute care hospital may exceed the limitations set forth in these sections unless the hospital has requested and received an exception from the Cost of Living Council. Subject to the general requirements relating to exceptions imposed by Part 155, the Council, in reviewing requests for exceptions, will examine the following data :

(1) All exception requests for additional revenues will be evaluated for cost justification. In examining the cost justification, the Council will make its evaluation on the basis of prudent management practices and generally accepted accounting principles consistently applied. In making this evaluation, the Council will consider the following items :

(i) Any investment or operating costs resulting from capital expenditures.

(ii) Costs ensuing from mandatory requirements imposed by government regulation resulting in increased expenses by the hospital.

(iii) Costs incurred with respect to wage increases for employees whose wages are substandard, as defined in § 152.32 of this Title, or below minimum wage rates imposed by Federal or state statutes of general application.

(iv) Working capital needs.

(2) Significant changes in patient mix that require substantially more expensive care.

(3) Any statutory necessity for adjustment of charges which are less than costs.

(4) Experimentation in hospital reimbursement methodologies.

(5) Evidence of effective cost containment initiatives undertaken by the hospital.

(b) The primary criteria that will be used in evaluating exemption requests involving capital expenditures, as defined in section 1122 of the Social Security Act (42 U.S.C. 1320a-1) and its implementing regulations (42 CFR Part 100), are the community need for the capital expenditure, and the justification for the price increase requested. In addition the following procedural rules apply :

(1) The burden of documenting community need and price justification is on the hospital.

(2) If a planning agency designated by the governor of a state (for example, an agency acting pursuant to section 1122 of the Social Security Act, a certificate of need agency, or a rate setting commission) has approved on substantive grounds a capital expenditure for which an exception is requested, there is a presumption of community need for the expenditure.

(3) If a planning agency approves a certificate of need on procedural grounds only, or refuses or fails to act, there is no presumptive proof of community need.

(4) If a planning agency denies a certificate of need on substantive grounds, or if a final determination of community need under section 1122 of the Social Security Act is made by the Department of Health, Education and Welfare and the determination is negative, there is an adverse presumption against the requested price increase for capital and related operating expenditures.

§ 150.524 Advisory state actions.

The governor of each state and the mayor of the District of Columbia are requested to designate an agency to advise the Council on requests for exceptions to these regulations or on any other matters that the Council may from time to time specify.

§ 150.525 State control program.

(a) Any State or the District of Columbia that has a health care price control program may apply to the Cost of Living Council for authorization to administer the State control program in lieu of the controls set forth in these sections and administered by the Cost of Living Council. The agency designated by the State to administer the program shall submit to the Cost of Living Council the existing or proposed rules for use by its agency in considering requests

for price increases for each kind of acute care hospital service under its jurisdiction.

(b) The existing or proposed rules must be generally fair and equitable, and have substantially the same effect on health care charges and costs as set forth herein; provided, however, that the provisions of § 150.521 shall apply to any control program administered by an agency pursuant to this section.

(c) If the Cost of Living Council approves the proposed rules of an agency, it will notify the agency that when those proposed rules are finally adopted by the agency in accordance with applicable laws, the Cost of Living Council will issue a certificate of compliance to that agency. If the Cost of Living Council approves existing rules of an agency, it will issue a certificate of compliance to that agency.

(d) An acute care hospital may place in effect, in accordance with the rules of an agency to which a certificate of compliance has been issued, any price increase authorized or allowed to go into effect by that agency.

(e) The decisions of an agency pursuant to rules covered by a certificate of compliance issued under paragraph (c) of this section are not subject to review by the Cost of Living Council, or by any judicial or other body which would not be authorized to review the decisions of said agency in the absence of the Economic Stabilization Program. The rules shall be considered to be the rules of the agency and shall not displace any other rules or laws to which the agency is subject or which it has adopted which are not inconsistent with those rules.

(f) Each agency to which a certificate of compliance has been issued under paragraph (c) of this section shall also agree to furnish periodically to the Cost of Living Council such information as the Council may prescribe for the Council's use in determining whether the agency is following the rules it adopted in its decisions and practices and whether the purposes of the Economic Stabilization Program are being served.

(g) The Cost of Living Council may revoke a certificate of compliance issued under paragraph (c) of this section at any time, or take such other action with respect to the certificate as it considers appropriate, if it determines that the rules to which the certificate applies are not being followed or are not serving the purposes of the Economic Stabilization program. Price increases which an agency has finally approved, before a revocation or other action by the Cost of Living Council under this paragraph, pursuant to rules which have received a Cost of Living Council certificate of compliance shall in no way be affected by the Council's revocation of, or other action with respect to, the certificate.

LONG TERM CARE INSTITUTIONS

§ 150.528 *Limitations on average realized revenues per diem.*

A long-term-care institution's average realized revenues per diem during any fiscal year may not be more than 106.5 percent of its average realized revenues per diem during the preceding fiscal year.

§ 150.529 *Application of limitations.*

In applying § 150.528, the following shall apply:

(a) In determining the levels of care provided and the amount of average realized revenues, an institution shall follow generally accepted accounting principles consistently applied; *provided, however*, That in no event shall an institution change the criteria used during the preceding fiscal year for determining the respective levels of care for its patients.

(b) Unused revenue increases permitted for any level of care of any class of purchaser in any fiscal year may not be applied in that year to any other level of care of any class of purchaser.

(c) Revenue increases permitted in one year but not fully implemented may be accumulated, but not compounded, and only for the level of care of the class of purchaser to which the increase applied, and only in the next fiscal year following the year in which the full allowable increase was not taken.

§ 150.530 *Medicaid reimbursement rates.*

(a) If a State agency responsible for administering the Medicaid program within that State wishes to raise its general level of Medicaid reimbursement by more than 6.5 percent for any level of care and obtain an exception to the limitations of § 150.528 with respect thereto for each long term care institution within the State, the State may demonstrate and certify to the Council the following with respect to that Medicaid reimbursement rate increase:

(1) The former rate, the date it was established, the new rate, the percentage increase, and the proposed effective date of the new rate.

(2) That the increase is cost related, as demonstrated by a valid statistical sample.

(3) That the increase is necessary to implement and maintain the minimum standards of service required by Federal or State regulations, or both; and

(4) That the increase, in the opinion of the agency, is not inflationary within the meaning of the Economic Stabilization Program guidelines.

(b) Within 30 days after receipt of the State agency's certification, the Council may take one or more of the following actions:

(1) Require the State agency to furnish additional information regarding the rate increase.

(2) Suspend the 30-day period for Council action.

(3) Issue the State agency a certificate of compliance.

(4) Refuse to issue the State agency a certificate of compliance.

(c) If the Council issues a certificate of compliance to a State agency or fails to take any action within the time specified, then long-term care institutions in that State are not subject to the limitations contained in § 150.528 with respect to their average realized revenues derived from levels of care covered by the State agency's certification.

(d) If the Council refuses to issue a certificate of compliance to a State agency, then long-term care institutions in that State remain subject to all the limitations contained in § 150.528.

§ 150.531 *Special pricing rules.*

(a) The price for a new level of care, for a service or property provided by a new facility and for a service or property provided by a long term care institution serving a new market shall be determined as follows:

(1) To the maximum extent possible, the price of the level of care or of the service or property shall be the average price received in a substantial number of current transactions by comparable institutions providing comparable levels of care or comparable health care services and properties. If there are no comparable institutions with similar debt service and depreciation costs, the incremental amount of these costs may be reflected in the price.

(2) If comparable levels of care or comparable health care services are not provided by comparable institutions, then the institution may use any other pricing practice commonly used by other institutions, with the adjustment for debt service and depreciation costs commonly used by other institutions, permitted by paragraph (a) (1) of this section.

(b) The revenues derived from the provision of a new level of care, from the provision of a service or property by a new facility and from the provision of a service or property by a long term care institution serving a new market are not subject to the limitations contained in § 150.528.

(c) Each institution which prices a property or service provided by or in a new facility or new market, respectively, in accordance with paragraph (a) of this section shall submit justification for those prices to the Cost of Living Council on CLC Form ---- at the end of the fiscal year in which the price was implemented.

§ 150.532 *Price schedules.*

Each long term care institution shall maintain at each of its facilities a schedule showing its prices for all services provided to private pay patients on the last day of the preceding fiscal year, and each subsequent change in such a price and the date such change was made. The schedule shall be made available for public inspection, and a copy shall be furnished to the public, to third party payors, and to a representative of the Cost of Living Council upon request. Each institution shall post a conspicuous and easily readable sign in each of its facilities stating the availability and location of the schedule. No price may be increased before the sign is posted and the schedule is made available.

§ 150.533 *Reporting procedures.*

Each long term care institution shall, within 120 days after the end of each fiscal year, submit a completed CLC Form ---- to the Cost of Living Council, Office of Health, Compliance Division, 2000 M Street, NW., Washington, D.C. 20508.

§ 150.534 *Exceptions; advisory state actions; state control program.*

The provisions of § 150.523, § 150.524, and § 150.525 relating to exceptions, advisory state actions and state control programs for acute care hospitals, also apply to long term care institutions.

HEALTH MAINTENANCE ORGANIZATIONS AND HEALTH MAINTENANCE ORGANIZATION PROVIDERS OF HEALTH CARE

§ 150.536 *Criteria for rate increases.*

(a) Except as provided in paragraphs (b) and (c) of this section, each rate increase put into effect by an HMO after December 31, 1973, which would increase the rate above the level in effect on that date, must be consistent with the following criteria:

(1) Actual costs may be used in the customary manner in the ratemaking process.

(2) Factors in the ratemaking process or in the actual determination of the final rate that relate to or reflect changes in claim frequency, occurrence or utilization, or similar changed conditions of risk may be used in accordance with customary practice provided such factors are supported statistically.

(3) Administrative expenses may be loaded on an actual cost basis, if statistically supported. If factors for administrative expenses are loaded as a percentage of the rate, they must be limited to a maximum of a 5-percent increase in the dollar amount represented by the loading that was used in the prior rate.

(4) Any profit portion of the rate, whether loaded as a percentage of the rate or a dollar amount per contract, must be limited to a 2.5-percent increase in the dollar amount represented by the loading for the profit that was used in the prior rate. For purposes of this section, any portion of the rate which is classified as a contribution to reserve, contingency reserve or similar element where a profit as such is not a part of the ratemaking process, shall be treated as the profit provision.

(5) Factors in the ratemaking process anticipating costs or price increases may be used, if statistically supported, in accordance with customary practice in the ratemaking process, subject to the following restrictions:

(i) For that portion of the factor that represents the provision of inpatient care in an acute care hospital, if the contract between the HMO and the acute care hospital is on a percentage of charge or fixed charge per admission basis the increase is limited to 7.5 percent per admission per year; if the contract is on a fixed charge per capita basis, the increase is limited to 9 percent per capita per year; or if the acute care hospital is owned or operated by the HMO, the increase is limited to 9 percent of its inpatient operating expenses per year.

(ii) For that portion of the factor that represents the provision of outpatient hospital care, the increase is limited to 6 percent per procedure per year.

(iii) For that portion of the factor that represents the provision of health care by a medical practitioner, if the contract is on a fee-for-service basis the increase is limited to 4 percent per charge per year; or if the contract is on a fixed dollar amount or per capita basis, the increase is limited to 6.2 percent per year.

(iv) For that portion of the factor that represents the provision of inpatient care by a long term care institution, the increase is limited to 6.5 percent in average realized revenues per diem per year.

(b) A rate increase approved by the Cost of Living Council on or before December 31, 1973 but not put into effect by the HMO prior to that date may be put into effect according to its terms.

(c) A new HMO is not subject to the limitations set forth in paragraph (a) (5) of this section.

§ 150.537 *Change in ratemaking formula.*

No HMO may change a ratemaking formula, procedure, or technique, or other element in the ratemaking process unless—

(a) The change will not result in an overall rate increase; or

(b) The change is necessitated by legislation or regulation promulgated in a particular jurisdiction; or

(c) Written approval has been granted by the Cost of Living Council.

§ 150.538 *Prenotification.*

Each prenotifier shall file a written notice with the Cost of Living Council and the appropriate State regulatory agency of the State to which the rate increase is applicable or the State regulatory agency of the HMO's domicile

when a rate increase is proposed for use in more than one State, of each proposed rate increase in excess of 5 percent which affects \$500,000 or more of its annual revenues under the existing rate. Each HMO submitting a notice under this section shall certify to the Cost of Living Council and the State regulatory agency that the proposed rate increase conforms to the requirements of §§ 150.536 and 150.537. The certification must be signed by the chief executive officer of the prenotifier or by an individual to whom he has delegated that authority. A copy of the delegation must be filed with the Cost of Living Council.

§ 150.539 Certification by State regulatory agency.

A State regulatory agency may agree, in writing, with the Cost of Living Council to certify that the rate increases of which it has received prenotification under § 150.538 are or are not in compliance with §§ 150.536 and 150.537. Each agency entering into such agreement with the Cost of Living Council shall furnish its certification to the Council (with a copy to the HMO) within 20 days after it receives the notice. A certification by an agency under this section is prima facie evidence that the proposed rate increase is or is not in compliance with §§ 150.536 and 150.537.

§ 150.540 Self-certification.

Whenever a prenotifier cannot obtain a certification of a rate increase from a State regulatory agency in accordance with § 150.539 because:

- (a) There is no State regulatory agency;
- (b) The State regulatory agency concerned has not agreed to furnish certification under that section; or
- (c) The State regulatory agency did not act upon the filing within the period required under this section: the prenotifier shall immediately notify the Cost of Living Council that it cannot obtain the certification and may request the Council to act upon the certification filed with it under § 150.538.

§ 150.541 Federal Employees Health Benefits Law.

The Cost of Living Council designated the U.S. Civil Service Commission to act as certifying agent for contracts of HMO's under the Federal Employees Health Benefits Law. Each prenotifier that proposes to increase rates under a Federal Health Benefits contract by more than 5 percent shall file notice thereof with the Cost of Living Council that the increase is or is not in compliance with § 150.536 and that certification is prima facie evidence of compliance or non-compliance. A rate certified by the Civil Service Commission as being in compliance may go into effect on any date, specified by that Commission, that is at least 10 days after the date of the certification, and at least 30 days after the date of prenotification.

§ 150.542 Cost of Living Council actions.

(a) With respect to any rate increase certified by a State regulatory agency under § 150.539, or self-certified by a prenotifier, the Cost of Living Council may, within 30 days after the State regulatory agency received the prenotification, or within 30 days after the Cost of Living Council receives the prenotification under § 150.538, take one or more of the following actions:

- (1) Require the HMO to furnish additional information regarding the increase.
- (2) Delay the effective date of the increase pending further Council action.
- (3) Suspend all or part of the effect of the increase, pending further action by the Cost of Living Council or by the State regulatory agency.
- (4) Limit, refuse, rescind, reduce, or modify the increase.

(b) If the Cost of Living Council does not act upon a request under this section before the end of the thirtieth day as described above, the increase may go into effect. However, in any case in which that period would otherwise end on a Saturday, Sunday, or Federal holiday, it will end at the close of the next succeeding workday. However, if after implementation of the rate increase the Council finds that the increase is inconsistent with the rules of this subpart or unreasonably inconsistent with the goals of the Economic Stabilization Program, it may issue an order modifying, deferring, suspending or disapproving the rate increase. A prenotification to a State regulatory agency which has been certified by that agency as being not in compliance with §§ 150.536 and 150.537 may not be placed into effect unless the written approval of the Cost of Living Council has been granted.

§ 150.543 HMO rates subject to State laws.

Approval of an HMO rate increase or rating formula under these sections does not authorize the use of a rate or formula in contravention of any applicable State law.

§ 150.544 *Reporting.*

Each HMO shall file an annual report with the Cost of Living Council with a copy to the appropriate State regulatory agency at the time it normally releases its annual reports, but in any event no later than 120 days after the end of the fiscal year. This report shall include information specified by the Cost of Living Council on a form to be prescribed by the Council.

§ 150.545 *HMO providers of health care.*

(a) An HMO provider of health care that is an acute care hospital is limited to:

(1) In the provision of outpatient care, an increase in its charges of 6 percent per procedure per year;

(2) In the provision of inpatient care:

(i) An increase in its charges of 7.5 percent per admission per year, if the contract between the HMO and the acute hospital is on a percentage of charge or fixed charge per admission basis; or

(ii) An increase in its charges of 9 percent per capita per year, if the contract is on a per capita basis; or

(iii) An increase in its inpatient operating expenses of 9 percent per capita per year if that acute care hospital is owned or operated by the HMO.

(b) An HMO provider of health care that is a medical practitioner is limited to:

(1) An increase of 4 percent per year in his aggregate weighted price, computed on the preceding calendar year's billings, for all services and property, if the contract between the HMO and the practitioner is on a fee-for-service basis; or

(2) An increase in its charges of 6.2 percent per year, if the contract is a fixed dollar amount or on a per capita basis.

(c) An HMO provider of health care that is a long term care institution is limited to an increase of 6.5 percent per year in its average realized revenues per diem.

(d) An HMO provider of health care is excluded from the limitations of paragraphs (a), (b), and (c) of this section if it is providing health care for an HMO that is a new HMO.

[FR Doc. 73-23874 Filed 11-6-73; 10:20 am]

[From the Federal Register, Nov. 16, 1973]

TITLE 6—ECONOMIC STABILIZATION

CHAPTER I—COST OF LIVING COUNCIL

[Phase IV Price Ruling 1973-7]

APPENDIX—PHASE IV PRICE RULINGS

Rulings and Interpretations

Facts. During Phase IV, rulings and interpretations have been issued by the Cost of Living Council. Section 155.2 of the Phase IV price procedures defines a ruling as "an official interpretation by the General Counsel of the Cost of Living Council, published in the FEDERAL REGISTER, which applies the regulations and guidelines of the Cost of Living Council to a specified set of facts." An interpretation is defined in the same section to mean "a written statement issued by a district director in response to an inquiry by an individual or an organization, which applies to the particular facts involved the principles and precedents previously announced by the Cost of Living Council."

Issue. What is the nature and effect of Cost of Living Council Phase IV price rulings and interpretations?

Ruling. Under 6 CFR 155.161 it is explained that Cost of Living Council rulings are (a) of general applicability, (b) illustrative of a general principle, or (c) of assistance to the public in applying the Act, regulations and guidelines to a specific situation. Because rulings are of general applicability, their issuance cannot be considered an adverse action in any particular case from which an aggrieved person may request reconsideration pursuant to Subpart F of Part 155.

Since rulings are also explanatory in nature, their effectiveness relates back to the effective date of the regulations or guidelines they explain. However, when-

ever rulings cause a person to change a business practice previously followed in good faith reliance on the presumed intent of the regulations, the Cost of Living Council shall, in the course of determining whether that person has violated the regulations, take into account the extent to which that person could reasonably be deemed to have prior notice of the interpretation contained in the ruling.

Interpretations on the other hand, are issued only where a determination can be made on the basis of established rules as set forth in existing regulations, guidelines, rulings, or court decisions. Written requests for interpretation should be filed with the appropriate key IRS District Office pursuant to § 155.21 (b) (7) and will receive initial action by the Cost of Living Council pursuant to § 155.22 (d) or the Internal Revenue Service pursuant to the delegation of authority contained in paragraph (1) (k) of Cost of Living Council Order No. 37. Any person who receives an adverse interpretation from the Council may seek reconsideration under Subpart F of Part 155.

WILLIAM N. WALKER,
General Counsel,
Cost of Living Council.

NOVEMBER 15, 1973.

[FR Doc. 73-24667 Filed 11-15-73 ; 12 :22 pm]

COST OF LIVING COUNCIL

[6 CFR Part 150]

PHASE IV PRICE REGULATIONS

PROPOSED PRICE CONTROLS FOR PETROLEUM INDUSTRY

Notice is hereby given that, pursuant to authority of Executive Orders 11695 and 11730, the Cost of Living Council, as part of its continuing review of the operation of price controls with respect to the petroleum industry, is considering the adoption of certain amendments to the Phase IV petroleum regulations to be effective November 30, 1973.

A major change is elimination of the refiner-researcher rule. Pursuant to this amendment, the refiner would be required to include all product cost increases in the § 150.356 formula for allocation of increased product costs. This should prevent further divergence in the base prices for a single covered product which have resulted from the dissimilar calculation of increased costs solely as a function of whether a firm commingles an imported product with domestic product.

For this reason, the reseller rule § 150.359 has been amended to exclude refiner-resellers, and the refiner's rule § 150.355 has been amended to apply to all sales by a refiner. The terms "refiner-reseller" and "refiner-retailer" would no longer be operative and have been eliminated from the definitions in § 150.352.

The proposed amendment to § 150.355 contains a simplified restatement of the formula for the allocation of non-product cost increases which was initially proposed by the Council in its October 15, 1973 notice of proposed rule-making. The formula translates the percentage of prenotified non-product cost increase "F", appearing in item 24 column (f) Part IV of CLC-22 into a dollar amount of costs to be allocated among the special products and other covered products. These costs are computed on the basis of projected sales for a twelve period "e". For special products (gasoline, No. 2 heating oil and No. 2-D diesel fuel), the cost increase is divided by the estimated twelve month sales volume "V" of that special product to reflect the dollar amount "d" by which the base price to each class of purchaser may be increased. For non-special covered products a total dollar amount of cost "D" is computed, and may be allocated to any of the non-special products in any amounts provided any increase is equally applied among all classes of purchasers of the particular product.

The purpose of this formula is to assure that non-product cost increases prenotified on a product line basis are allocated to the products in that product line in a manner similar to the allocation of product cost increases in § 150.356. The amendments proposed for § 150.356 are made in response to comments received from the industry, and specifically address the request by the smaller refineries to simplify and clarify the formula for allocation of increased product costs. Among the significant modifications in the general formula is the change

to total sales volume from total sales revenues for use in allocating the increased costs of crude petroleum. This change is proposed in order to more accurately reflect the economies of increased product costs on particular products. Similarly, the levels of distribution, previously reflected by the symbol "j" have been eliminated in order to permit normal price movement between levels of distribution and avoid the possible development of pricing distortions.

Also, No. 2-D diesel fuel and No. 2 heating oil are now represented by $i = \text{fig 1}$ in the formula. Consolidation of these two basically interchangeable products for purposes of the allocation of increased product costs is designed to allow a similar price movement for these similar products. For the symbol "Y", in place of the current complex computation required, a refiner would have the option of establishing the cost of purchased products as either the lowest price at or above which 10% of the product was priced in transactions with wholesalers in May 1973 or a cost of product accounting figure if approved by the Council.

Other technical changes in the formula are also proposed. A separate formula for non-special products is provided to more accurately reflect that a total dollar amount is calculated for such products. A new variable "G" is placed in both formulas which reflects the unused costs which have been carried over from previous months pursuant to paragraph (d) of § 150.356. A variable "H" in both formulas reflects the increased costs allocated to special products which pursuant to paragraph (c) (1) (ii) a refiner elects to use for non-special products. Paragraph (d) of § 150.356 is amended to make clear that if in any month a refiner adds an "H" factor to the formula for non-special products, any amount not received in sales of non-special products may only be carried over and applied to sales of non-special products in a subsequent month.

Adjustments have been made to the definitions in § 150.356, in order to focus on combined petroleum products costs—both crude petroleum and purchased petroleum products. Crude petroleum costs are re-defined to include both imported and domestic crude costs. Thus, the subscript "k", which previously identified the origin of the product, has been eliminated from the allocation formula as no longer necessary. In further recognition of all product cost ingredients, the definition of crude petroleum has been broadened to include unfinished oils used in refining.

A new definition "increased product costs" consolidates all increased costs over the May 15, 1973, cost level and thereby eliminates any need to impute the cost of petroleum purchased from a different source if the firm purchased that product from any source in May 1973. If a firm did not make any purchases of a particular covered product in May 1973, the cost from which increases are measured shall be imputed as the lowest price at or above which at least 10% of that product was priced by the refiner during the month of May 1973.

Products purchased by the refiner, whether imported or domestic are described by the term "petroleum product" and denote covered products, including covered natural gas liquids which the refiner buys, but which are not unfinished input in refinery operations, whether or not these products are commingled with products refined by the refiner.

A change in the "landed cost" definition makes it clear that only transportation costs to the domestic entry port are part of "landed costs." Similarly, the definition of "cost of crude petroleum" is amended to clarify that in no circumstances does this include domestic transportation costs.

Finally, in order that the Council may more closely monitor the increased product costs a refiner uses to increase May 15, 1973, selling prices, monthly reports will be required.

Interested persons are invited to participate in the rulemaking by submitting written data, views or arguments with respect to the proposed regulations set forth in his notice to the Executive Secretariat, Cost of Living Council, 200 M Street NW., Washington, D.C. 20508.

Comments should be identified on the outside envelope and on the document submitted with the designation "Proposed Phase IV Petroleum Amendments," and should be organized so that those comments dealing with a particular rule are on a separate page from those dealing with other rules. Ten copies should be submitted. All comments received by November 26, 1973, will be considered by the Council before final action is taken on the proposed regulations. The proposed regulations may be changed in light of the comments received. All comments received in response to this notice will be available for examination and copying by interested persons at the Cost of Living Council, 2000 M Street NW., Washington, D.C., 20508, during the hours of 9 am and 5 pm, Monday through Friday.

(Economic Stabilization Act of 1970; as amended, Pub. L. 92-210, 85 Stat. 743; Pub. L. 93-28, 87 Stat. 27; E.O. 11695, 38 FR 1473; E.O. 11730, 38 FR 19345; Cost of Living Council Order No. 14, 38 FR 1489.)

In consideration of the foregoing, it is proposed to amend Part 150 of Title 6 of the Code of Federal Regulations as set forth below.

Issued in Washington, D.C., on November 15, 1973.

JAMES W. McLANE,
Deputy Director,
Cost of Living Council.

§ 150.352 [Amended]

1. Section 150.352 is amended by deleting the definitions of "refiner-reseller" and "refiner-retailer".

2. Section 150.355 is revised to read as follows :

§ 150.355 *Price rule: Refiners.*

(a) *Applicability.* This section applies to each sale of a covered product which is purchased or refined by a refiner.

(b) *Rule.* A refiner may not charge to any class of purchaser a price in excess of the base price of that covered product except to the extent permitted pursuant to the provisions of paragraphs (c) through (k) of this section.

(c) *Price increases.* (1) A price in excess of the base price of an item in a product line may be charged only to recover on a dollar-for-dollar basis those net increases in allowable costs that have been incurred with respect to the product line since the period for determining base cost and which the refiner continues to incur.

(2) For the purpose of determining whether net allowable costs have been incurred which permit the charging of a price in excess of the base price, base costs shall be compared with current costs. Current costs which exceed base costs may be used to justify a price in excess of the base price. "Allowable costs" under this section mean non-product costs attributable to refining operations under the customary accounting procedures generally accepted and historically and consistently applied by the firm concerned and exclude any costs attributable to marketing operations.

(d) *Application of price increases.* (1) A firm may not increase prices above base prices pursuant to this section until it complies with the prenotification requirements of Subpart H of this part.

(2) A firm which is authorized to charge a prenotified percentage price increase pursuant to Subpart H of this part with respect to a product line by virtue of cost justification determined in accordance with this section, shall apply that percentage price increase in the following manner: (i) A refiner may charge a price in excess of the base price of a special product which reflects that part of the total allowable percentage price increase with respect to the product line allocable to sales of that special product: *Provided, That* (a) The amount of the increase above the base price is calculated by use of the formula in paragraph (d)(3)(i) of this section; (b) the amount of increased costs allocable to that special product is equally applied to each class of purchasers; and (c) the increase above the base prices may not be implemented more than once in any calendar month and must be implemented on the same date that increased product costs are added to May 15, 1973 selling prices to compute base prices pursuant to paragraph (g) of this section.

(ii) A refiner may charge a price in excess of the base price of its covered products other than special products which reflects that part of the total allowable percentage price increase with respect to the product line allocable to sales of those products or sales of special products not otherwise allocated pursuant to paragraph (d)(2)(i) of this section: *Provided, That*, (a) the amount of increase above the base price is calculated by use of the formula in paragraph (d)(3)(ii) of this section and (b) the amount of increased costs allocated to a covered product other than a special product is equally applied to each class of purchaser.

(3) *General formulae.* (i) For special products ($i=1$ and $i=2$) :

$$d_i^e = \frac{S_i^e F}{V_i^e}$$

(ii) For covered products other than special products ($i=3$):

$$D_i^e = S_i^e F$$

Where; for (a) and (b):

d_i^e =The dollar amount that may be added to each base price of the special product or products of the type " i " in the period " e " (the consecutive 12-month period). The formula for special products must be computed separately for $i=1$ (No. 2 heating oil and No. 2-D diesel fuel) and $i=2$ (gasoline).

D_i^e =The total dollar amount a refiner may add in the period " e ", (the consecutive 12-month period) to base prices of covered products of the type " i " in whatever amount it deems appropriate to each particular covered product other than a special product. The formula for covered products other than special products will only be computed for $i=3$ (all covered products other than special products and crude petroleum).

V_i^e =Estimated volume or quantity of sales of a specific covered product of the type " i " in the period " e " (the consecutive 12-month period).

S_i^e =Estimated total revenues from sales for the period " e " (the consecutive 12-month period), of a specific covered product or products of the type " i " at May 15, 1973, price levels.

F =The percentage of cost justification entered for all covered products under column (f), item 24, Part VI, of CLC Form 22.

The time period for measurement is referenced by the superscript e :

e =The consecutive twelve-month period for which the cost-justification is proposed, commencing the first day following the accounting month most recently ended prior to the date of signing the prenotification CLC Form 22.

The type of covered product is referenced by the subscript i :

$i=1$ represents No. 2 heating oil and No. 2-D diesel fuel.

$i=2$ represents gasoline.

$i=3$ represents all covered products other than special products and crude petroleum.

(e) *Price reductions.* A price charged in excess of the base price may continue to be charged only as long as the net increases in allowable costs which support that price in excess of the base price continue to be incurred. Price reductions shall be made whenever and to the extent necessary to assure that, for any fiscal quarter, the weighted average of all price increases and price decreases in a product line does not exceed the percentage of cost justification for that line.

(f) *Productivity gains.* (1) Increases in allowable costs shall be reduced to reflect productivity gains. For the purpose of determining whether a price may be charged above a base price pursuant to this section, productivity gains shall be calculated on the basis of the average percentage gain in the applicable industrial category, as set forth in the table in the Appendix to Subpart E. To the extent provided in the table in the Appendix, productivity gains shall be taken into account in the calculation of all price increases during any fiscal year but only until the full productivity offset, derived from the Appendix and calculated under paragraph (f) (2) of this section, has been used within that fiscal year.

(2) For the purpose of determining the extent to which a price increase is justified, each refiner shall calculate the sum of all of its labor costs (of the type required to be included as costs in reporting and prenotification forms issued pursuant to Subpart H of this part) as a percentage of sales for the product line concerned, and shall multiply that percentage by the average annual rate of productivity gain for the applicable industrial category, as set forth in the table in the Appendix to Subpart E. The result is the productivity gain, stated as a percentage, by which the total cost increase must be reduced in order to be an allowable cost for the purposes of a price increase under this section.

(3) If the product line concerned extends to more than one industrial category, the average percentage gain in productivity in each category must be weighted in proportion to the ratio which its estimated sales in each industrial category for the most recently completed fiscal quarter bears to the total sales of that product line for that quarter.

(g) *Base price*—(1) *General rule.* The base price for sales of an item by a refiner is the weighted average price at which the item was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and the month of May 1973, and measured pursuant to the provisions of §150.356. In computing the base price, a firm may not exclude any temporary special sale, deal or allowance in effect on May 15, 1973.

(2) *Special products.* Notwithstanding the general rule in paragraph (g) (1) of this paragraph, in computing the base price for special products, a refiner may not increase its May 15, 1973, selling prices to each class of purchaser more than

once in any calendar month to reflect the increased product costs allowable pursuant to the provisions of § 150.356, but may implement the increase on any day during that month.

(3) *Imputed prices.* If no transaction occurred with respect to a particular product on May 15, 1973, the most recent day preceding May 15, 1973, when a transaction occurred shall be used for purposes of computing the base price. If a refiner first offered an item for sale after May 15, 1973, and prior to the effective date of this paragraph, the first day when the item was offered for sale shall be used for purposes of computing the base price.

(h) *Base cost*—(1) *Base costs.* Base costs are the net allowable costs incurred with respect to the product line concerned and are calculated as follows:

(i) *Input costs.* The base cost with respect to costs of labor, crude petroleum and other input costs is the rate at which those costs were being incurred on May 15, 1973. If no input costs were incurred on that day, the base cost is the rate at which those costs were being incurred on the next day preceding May 15, 1973 on which input costs were incurred.

(ii) *All other costs.* The base cost with respect to all costs other than input costs is the rate at which those costs were being incurred on May 15, 1973. However, if the base cost with respect to any costs other than an input cost cannot reasonably be determined by the method prescribed in the preceding sentence, that base cost is the average cost incurred throughout the last fiscal quarter which ended before May 15, 1973, in which costs were incurred with respect to the product line concerned as calculated in accordance with forms and instructions issued by the Cost of Living Council.

(2) *New items.* The base cost with respect to input costs for each new item, as defined in accordance with § 150.361, is calculated as of the date on which the new item concerned was first sold or leased in arms-length trading between unrelated persons. The base cost with respect to all other costs which cannot be calculated on the first day of sale is the average cost incurred throughout the fiscal quarter in which the new item concerned was first sold or leased in arms-length trading between unrelated persons.

(i) *Current cost*—(1) *Current costs.* Current costs are the net allowable costs incurred during the current cost period with respect to the item concerned excluding increased product costs incurred after May 15, 1973 and measured pursuant to § 150.356.

(2) *Input costs.* The current cost with respect to costs of labor, crude petroleum and other input costs is the rate at which those costs were being incurred on the last full day of business in the current cost period.

(3) *All other costs.* The current cost with respect to all costs other than input costs is the rate at which those costs were being incurred on the last full day of business in the current cost period. However, if the current cost with respect to all costs other than input costs cannot reasonably be determined by the method prescribed in the preceding sentence, that current cost is the average cost incurred throughout the current cost period with respect to those costs as calculated in accordance with forms and instructions issued by the Cost of Living Council.

(4) *Current cost period.* The current cost period is the last accounting month preceding the date of signature of the prenotification document submitted in accordance with Subpart H of this part except that with respect to input and other costs which may be calculated as of a date certain, the rate at which these costs are incurred on the day which is the date of signature of the prenotification document may be considered the rate on the last full day of the current cost period.

(j) *Profit margin limitation.* A refiner which charges a price for any item in excess of the base price for that item in any fiscal year may not for the fiscal year in which the price increase is charged, exceed its base period profit margin as defined in § 150.31 of this part.

(k) *Certification.* Each refiner of gasoline must, with respect to each sale of gasoline other than a retail sale, certify in writing to the purchaser the octane number of the gasoline sold.

3. Section 150.356 is revised to read as follows :

§ 150.356 *Allocation of Refiner's increased product costs.*

(a) *Scope.* This section prescribes the requirements governing the inclusion of a refiner's increased product costs in the computation of its base prices pursuant to § 150.355(g) for covered products.

(b) *Definitions.* For purposes of this section—

“Cost of crude petroleum” means

(1) For purposes of domestic crude petroleum, (a) in arms-length transactions, the purchase price provided that it conforms with the requirements of § 150.354; (b) in a transaction between affiliated entities, the posted price for the new crude petroleum and the posted price or price determined pursuant to § 150.354(c) (3) for base production control level crude petroleum. If there is no posted price in a particular field, the related price for that grade of new domestic crude petroleum which is most similar in kind and quality at the nearest field for which the price is posted and the price determined pursuant to § 150.354(c) (3) for base production control level crude petroleum. Cost of crude petroleum also includes the cost of unfinished oils used in refining which are covered products. In no case does the cost of domestic crude petroleum or unfinished oils include transportation costs.

(2) For purposes of imported crude petroleum, the landed cost.

"Cost of petroleum product" means

(1) For purposes of domestic petroleum products other than crude petroleum, the purchase price.

(2) For purposes of imported petroleum products other than crude petroleum, the landed cost.

"Firm" means a parent and the consolidated and unconsolidated entities (if any) which it directly or indirectly controls.

"Increased product costs" means the sum of (1) the difference between the total cost of crude petroleum during the month of measurement and the total cost of crude petroleum during the month of May 1973, plus (2) the difference between the total cost of petroleum product during the month of measurement and the total cost of petroleum product during the month of May 1973. If a particular petroleum product was neither purchased nor landed during the month of May 1973, the cost of that petroleum product in May 1973 shall be imputed to be the lowest price at or above which at least 10% of that product was priced by the refiner in transactions during the month of May 1973.

"Landed cost" means: (1) For purposes of complete arms-length transactions, the purchase price at the point of origin plus the actual transportation cost. (2) For purposes of products purchased in arms-length transactions and shipped pursuant to a transaction between affiliated entities, the purchase price at the point of origin plus the transportation cost computed by use of the accounting procedures generally accepted and consistently and historically applied by the firm concerned. (3) For the purposes of products purchased in a transaction between affiliated entities and shipped pursuant to an arms-length transaction, the cost of the product computed by use of the customary accounting procedures generally accepted and consistency and historically applied by the firm concerned plus the actual transportation cost. (4) For purposes of products purchased and shipped pursuant to a transaction between affiliated entities, the costs of the product and the transportation both computed by use of the customary accounting procedures generally accepted and consistently and historically applied by the firm concerned. In all cases, the cost of transportation includes only the costs associated with the transportation from the point of origin to the port of entry into the United States.

"Transactions between affiliated entities" means all transactions between entities which are part of the same firm and transactions with entities in which the firm has a beneficial interest to the extent of entitlement of covered product by reason of the beneficial interest.

(c) *Allocation of increased-costs*—(1) *General Rule*.—(i) *Special products*. In computing base prices for sales of a special product, a refiner may increase its May 15, 1973 selling prices to each class of purchaser once each calendar month beginning with November 1973, by an amount to reflect the increased product costs attributable to sales of that special product using the differential between the month of measurement and the month of May 1973, provided that the amount of increased costs used in computing a base price is calculated by use of the general formula set forth in paragraph (c) (2) (i) of this section. To the extent that a refiner does not allocate its increased product cost for a special product pursuant to this provision, it may include that part of its increased product costs attributable to sales of that special product in computing its base prices for covered products other than special products pursuant to paragraph (c) (1) (ii) of this section.

(ii) *Other than special products*. In computing base prices for a covered product other than a special product, a refiner may increase its May 15, 1973, selling price to each class of purchaser each month beginning with November

1973, by an amount to reflect the increased product costs attributable to sales of covered products other than special products or sales of special products not otherwise allocated pursuant to paragraph (c) (1) (i) of this section using the differential between the month of measurement and the month of May 1973, provided that the amount of increased costs used in computing a base price is calculated by use of the general formula set forth in paragraph (c) (2) (ii) of this section and: *Provided*, That the amount of increased product costs included in computing base prices of a particular covered product other than a special product must be equally applied to each class of purchaser. In apportioning any amount of increased product costs to covered products other than special products, a refiner may apportion the total amount of increased product costs to a particular covered product other than a special product in whatever amount he deems appropriate.

(2) *General formulae.* (i) For special products ($i=1$ and $i=2$):

$$d_i^u = \frac{A^t \left(\frac{V_i^n}{V^n} \right) + B_i^t + G_i^t + H_i^u}{V_i^u}$$

(ii) For covered products other than special products ($i=3$):

$$D_i^u = A^t \left(\frac{V_i^n}{V^n} \right) + B_i^t + G_i^t + H^u$$

Where; for (i) and (ii):

d_i^u = The dollar increase that may be applied in the period "u" (the current month) to the May 15, 1973, selling price of the special product or products of the type "i" to each class of purchaser to compute the base price to each class of purchaser. The formula for special products must be computed separately for $i=1$ (No. 2 heating oil and No. 2-D diesel fuel) and for $i=2$ (gasoline).

D_i^u = The total dollar amount a refiner may apportion in the period "u" (the current month) to covered products of the type "i" in whatever amounts it deems appropriate to each particular covered product other than a special product. The formula for covered products other than special products will only be computed for $i=3$ (all covered products other than a special product and crude petroleum).

V^n = The total volume of all covered products sold in the period "n" (the consecutive 3-month period of the preceding year such that the middle month of the period corresponds to the current month "u").

V_i^n = The total volume of a specific covered product or products of the type "i" sold in the period "n" (the consecutive 3-month period of the preceding year such that the middle month of the period corresponds to the current month "u").

V_i^u = The volume or quantity of a product or products of the type "i" estimated to be sold in the period "u" (the current month).

$$A^t = Q^t \left(\frac{C^t - C^o}{Q^t - Q^o} \right)$$

which is the total increased cost of crude petroleum purchased or landed in the period "t" (the month of measurement).

Where:

Q^t = The total quantity or volume of crude petroleum purchased in the period "t" (the month of measurement). For imported crude petroleum, the quantity or volume landed in the period "t" (the month of measurement).

Q^o = The total quantity or volume of crude petroleum purchased in the period "o" (the month of May 1973). For imported crude petroleum, the quantity or volume landed in the period "o" (the month of May 1973).

C^o = The total cost of crude petroleum purchased or landed in the period "o" (the month of May 1973).

C^t = The total cost of crude petroleum purchased or landed in the period "t" (the month of measurement).

$$B_i^t = c_i^t - c_i^o - Y_i(q_i^t - q_i^o)$$

which is the total increased cost of a specific covered product or products of the type "*i*" purchased or landed in the period "*t*" (the month of measurement).

Where:

- c_i^o = The total cost of a covered product or products of the type "*i*" purchased in the period "*o*" (the month of May 1973). For imported products, the cost of products of the type "*i*" landed in the period "*o*" (the month of May 1973).
- c_i^t = The total cost of a covered product or products of the type "*i*" purchased in the period "*t*" (the month of measurement). For imported products, the cost of products of the type "*i*" landed in the period "*t*" (the month of measurement).
- q_i^o = The total quantity or volume of a covered product or products of the type "*i*" purchased in the period "*o*" (the month of May 1973). For imported products of the type "*i*", the total quantity or volume landed in the period "*o*" (the month of May 1973).
- q_i^t = The total quantity or volume of a covered product or products of the type "*i*" purchased in the period "*t*" (the month of measurement). For imported products of the type "*i*", the total quantity or volume landed in the period "*t*" (the month of measurement).
- Y_i = The lowest price at or above which at least 10 percent of the product or products of type "*i*" were priced in transactions with wholesalers during the month of May 1973 or, if none occurred in that month, in the month next preceding May 1973 in which such transactions occurred. Alternatively, the cost of the product or products concerned during the month of May 1973 may be used if computed by use of accounting procedures generally accepted and consistently and historically applied by the firm concerned and provided that the Council has approved in writing of the cost figures used.
- $G_i^t = J_i^t - K_i^t$ which is the total dollar amount of increased costs of the product or products of the type "*i*" not recovered in sales of that product through the period "*t*" (the month of measurement) that have been carried forward pursuant to paragraph (d) of this section or the total excess revenues derived from sales of the product or products of the type "*i*" which must be subtracted pursuant to paragraph (d) of this section.

Where:

- J_i^t = The total dollar amount of increased product costs attributable to the product type "*i*" from August 1, 1973, through the period "*t*" (the month of measurement).
- K_i^t = The total dollar amount of increased product costs attributable to the product type "*i*" and recoverable by sales through the period "*t*" (the month of measurement) by adjusting the May 15, 1973, selling prices pursuant to the provisions of this subpart.
- H_i^u = The portion of the total dollar amount available in the period "*u*" (the current month) for inclusion in price adjustments to special products of the type "*i*" which pursuant to subparagraph (c)(1)(ii) the refiner elects to include in prices of covered products other than special products for the period "*u*" (the current month).
- H^u = The sum of the dollar amounts available in the period "*u*" (the current month) for inclusion in price adjustments to special products which pursuant to paragraph (c)(1)(ii) of this section, the refiner elects to include in calculating the base prices of covered products other than special products for the period "*u*" (the current month).

The type of covered product is referenced by the subscript *i*:

i=1 represents No. 2 heating oil and No. 2-D diesel fuel.

i=2 represents gasoline.

i=3 represents all covered products other than special products and crude petroleum.

The time period for measurement is referenced in the superscript; where:

n = The consecutive 3-month period of the preceding year such that the middle month of the period corresponds to the current month.

o = The month of May 1973.

t = The month of measurement. (The month of measurement is the month preceding the current month.)

u = The current month. Quantities calculated for the current month will be estimates which should be based on the best available data.

(d) *Carryover of costs.* (1) If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of less total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula and allowable under paragraph (c) (1) (i) of this section and that unused amount of increased costs is not used to increase May 15, 1973, selling prices pursuant to paragraph (c) (1) (ii) of this section, the amount of increased product cost not recouped may be added to the May 15, 1973, selling prices to compute the base prices for that special product for a subsequent month. The total amount allowable under paragraph (c) (1) (i) of this section may not include any amount represented by the symbol "H" in the formula in paragraph (c) (2) (i) of this section which pursuant to paragraph (c) (1) (ii) of this section the refiner has elected to include in a prior month in the calculation of the maximum permissible amount which may be used to adjust base prices of covered products other than special products. If in any month beginning with October 1973, a firm charges prices for a special product which result in the recoupment of more total revenues than the entire amount of increased product costs calculated for that product pursuant to the general formula and allowable under paragraph (c) (1) (i) of this section, the amount of excess product costs recouped must be subtracted from the May 15, 1973, selling prices to compute the base prices for that special product for the subsequent month.

(2) If, in any month beginning with October 1973, a firm charges prices for covered products other than special products which result in the recoupment of more or less total revenues than the entire amount of increased product costs calculated pursuant to the general formula and allowable under paragraph (c) (1) (ii) of this section, the excess revenues recouped must be subtracted from the May 15, 1973, selling prices and the amount of increased product costs not recouped may be added to May 15, 1973, selling prices to compute base prices for covered products other than special products in the subsequent month provided that the amount of the increased product cost not recouped and included in computing the base prices of a particular covered product other than a special product is equally applied to each class of purchaser. The total amount of increased product costs not recouped includes any amount represented by the symbol "H" in the formula in paragraph (c) (2) (ii) of this section which was available for inclusion in price adjustments to special products in a previous month and which the refiner elected pursuant to paragraph (c) (1) (ii) of this section to include in the calculation of the maximum permissible amount which may be used to calculate base prices for covered products other than special products.

(e) *Affiliated entities.* For purposes of this section, transactions between affiliated entities may be used to calculate increased product costs. Whenever a firm uses a landed cost which is computed by use of its customary accounting procedures, the Council may allocate such costs between the affiliated entities if it determines that such allocation is necessary to reflect the actual costs of those entities or the Council may disallow any costs which it determines to be in excess of the proper measurement of costs.

4. Section 150.359 is amended in paragraph (a) to read as follows:

§ 150.359 *Price rule: Resellers and retailers.*

(a) *Applicability.* This section applies to each sale of a covered product by resellers, reseller-retailers, and retailers.

* * * * *

5. Section 150.361 is amended in paragraph (b) (3) to read as follows:

§ 150.361 *New item and lease rule.*

* * * * *

(b) *Base price determination.* * * *

(3) *Resellers.* A reseller, reseller-retailer or retailer, offering a new item, shall for purposes of applying the price rule of § 150.359(c) determine the May 15, 1973, selling price for that item as the price at which that item is priced in transactions at the nearest comparable outlet on the day when the item is first offered for sale. For purposes of computing the "increased costs," the cost of the item first offered for sale shall be used rather than the May 15, 1973, cost.

* * * * *

6. Section 150.363 is amended in paragraph (a) (2) by adding a sentence which reads as follows:

§ 150.363 *Reports and recordkeeping.*

(a) *Reports.* * * *

(2) *Refiners, retailers and resellers.* * * * Each refiner making price adjustments under § 150.356(c) of this Subpart shall, in the month in which the adjustment is made, submit its calculations under the formulas of § 150.356(c) in accordance with forms and instructions issued by the Council.

* * * * *

[F R Doc. 73-24666 Filed 11-15-73 ; 12 :22 pm]



[See also Volume 2, Appendix to Hearings. I. Internal Revenue Service, Economic Stabilization Program, Phase IV Handbook, Revised September 1973; II. Internal Revenue Service, Economic Stabilization Program, Health Care Exceptions Manual, Preliminary Draft.]

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